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75-560

Dr. Robert B. Burns

Petitioner

v.

Dr. Robert D. Decker, President,
Bemidji State University;
Dr. G. Theodore Mitau, Chancellor,
Minnesota State University System;
Dr. Frank G. Chesley, President,
Minnesota State University Board

Respondents

PETITION FOR A WRIT OF CERTIORARI
FROM UNITED STATES COURT OF APPEALS
EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

Robert B. Burns
Pro se
RR #1 Box 321
Bemidji, Minnesota 56601

IN THE

SUPREME COURT OF THE UNITED STATES

Dr. Robert B. Burns

Petitioner

v

Dr. Robert O. Decker, President,
Bemidji State University;
Dr. G. Theodore Mitau, Chancellor,
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PROCEDURAL HISTORY

Federal District Court - District of Minnesota - Third Division

9-26-74 - Plaintiff's Summons and Complaints

10-21-74 - Defendants' Joint Answer

10-29-74 - Plaintiff's Motion to Strike Defendants' Joint Answer and/or for Them to be More Specific in Their Reply

11-4-74 - Defendants' Notice of Motion for Order Grating Summary Judgment in Favor of Defendents

11-13-74 - Plaintiff's Interrogatories with Affidavit

11-20-74 - Defendants' Notice of Motion and Motion for Protective Order on Answering Plaintiff's Interrogatories Until Motion for Summary Judgment is Decided

11-25-74 - Plaintiff's Notice of Motion to Strike Defendants' Joint Answer and/or for Them to be More Specific in Their Reply

11-29-74 - Plaintiff's Affidavit Against Defendants' Motion to Delay in Answering Plaintiff's Interrogatories

12-[illegible]-74 - Plaintiff's Affidavit, List of Documents Annotated, Memoranda of Law with Supporting Documents, Against Defendants' Motion for Summary Judgment

12-23-74 - Hearing on All Motions

PROCEDURAL HISTORY

1-3-75 - Memoranda and Order Entered Granting Defendants' Motion for Summary Judgment Against Plaintiff

1-16-75 - Affidavit in Support of Motion to Proceed Forma Pauperis on Appeal

1-17-75 - Memoranda and Order Denying Plaintiff's Request for Leave to Proceed Forma Pauperis on Appeal

1-20-75 - Notice of Appeal

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PROCEDURAL HISTORY

Eighth Circuit - United States Court of Appeals

1-23-75 - Application to Eighth Circuit for Leave to Proceed Forma Pauperis on Appeal
1-29-75 - Appellant's Designation of Record
2-13-75 - Denial of Motion to Proceed Forma Pauperis
3- 3-75 - Appeal Docketed
3- 4-75 - Application in Support of Motion to Hear Case on Original Record
3-11-75 - Bond on Appeal Posted in Federal District Court
3-13-75 - Order Permiting Parties to File Designation of Record
3-20-75 - Appellant's Designation of Record and Issues
4- 2-75 - Appellee's Designation of Record
4- 5-75 - Appellant's Brief Filed
4-22-75 - Appellee's Motion for Summary Disposition with Supporting Memoranda
4-29-75 - Appellant's Response for Denial of Appellee's Motion for Summary Disposition with Supporting Memoranda
7-17-75 - Per Curiam Opinion Entered Affirming Judgment of Lower Court
8- 8-75 - Mandate of Court Issued to U.S. District Court

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JURISDICTIONAL STATEMENT

The petitioner Robert B. Burns seeks review of the United States Supreme Court by Writ of Certiorari from the Eighth Circuit U.S. Court of Appeals.

Jurisdiction is founded upon the existence of a substantial question arising from differences in the application of Title 42 U.S.C.A. §1983 Civil Rights actions having prior state court judgment among the federal circuit and district courts as hereinafter more fully appears.

The percuriam opinion of the U.S. Eighth Circuit Court of Appeals was entered on July 17, 1975 affirming the lower court's judgment. Jurisdiction of this Court is hereby invoked under Title 28 U.S.C.A. §1254 (1).

AMENDMENTS

I – Freedeom of Speech and Press

XIV – " . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C.A. §1983

"Every person who, under color of any law, or state regulation.. . . subjects, or causes to be subjected, any citizen of the United States. . . to the deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress."

p31
pp41,42,43
pp45,46,50,54
56,71,a2
d4,d13

SCB 1965 University Faculties-[1]

SCB 13 - (Personal and Professional Rights and Responsibilities)

"Freedom in research, lectures, analysis and discussion is fundamental to the advance of truth. Academic freedom is fundamental for the protection of rights of the teacher in teaching and of the student in learning. It carries with it duties correlative with rights."

"(C) The (University) teacher is a citizen, a member of a learned profession, and an officer of an educational institution. When he speaks or writes as a citizen, he should be free from institutional censorship or discipline. He should remember, however, that the public tends to judge his profession and his institution by his utterances. Hence, he should show respect for the right of others to express opinions, and should not indicate that he is an institutional spokesman unless authorized to do so by the president or the faculty."

pp53,59.

1 Official Board Rules for State Colleges-1965 - on file Central Administration Board Offices

SCB 202 - (Discrimination Prohibited)

" . . . Employment in the System and the (Universities) shall be open to persons otherwise eligible. ."

pp-59.

SCB 203 - (Academic Freedom)

"Every individual within the State (University) System is entitled to full academic freedom as that concept is generally understood within institutions of higher education and articulated in particular by the American Association of University Professors in its 1940 Statement of Principles on Academic Freedom and Tenure. . ."

p-59.

SCB 209 - (Fair Procedures for the Imposition of Sanctions).

"(A) Notification of Rights.

"(B) Written Notice. (University) or System officials shall inform individuals in writing of the reasons for any proposed formal sanction against them, with sufficient particularity and in sufficient time for the individual to have an opportunity to prepare for the hearing of any charges."

pp-58,59.

SCB 17 (2) (Dismissal of Non-Tenure Faculty).

(Refer Appendix C - Minnesota Supreme Court Opinion page 3, herein.)

SCB 1971 Basic Rights[2]

SCB 201 - (Respect for Constitutional Rights)

"In their relations with the State (University) System individuals have the same legal duties and obligations as other persons and enjoy the same freedom of speech, press, religion, peaceful assembly, and petition that other persons enjoy. In all of their dealings with these individuals, therefore, the System and the (Universities) shall respect the rights guaranteed them by the Constitution and laws of the United States and the State of Minnesota. Nothing in the Governing Rules shall be construed to preclude the rights of the individual to petition the Board for a redress of any grievance."

pp58,59.

[2] p. 9-12 - of Official Board Rules - 1971

SCB 1971 Central Administration[3]

SCB 404 - (Duties and Responsibilities of the Chancellor)

"(A) General Responsibilities. The Chancellor . . . . is accountable to the Board for making certain that the System operates in accordance with Minnesota Statutes, these Governing Rules, Internal Rules, and Operating Policies. . ."

pp.58,59.

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[3]Id. p. 19

Arnett v Kennedy, 416 U.S. 134 (1974), (refer slip-opinion).....pp47,57 58,60

Avins v Mangum, 450 F. 2d 923 (Second Circuit 1971).....pp46,55

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Cafeteria Workers v McElroy, 367 U.S. 886, 898.....pp49

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Florida Board of Dentistry v Mack, 401 U.S. 960, cert. denied (1971).....pp42,46

Goodrich v Supreme Court of State of South Dakota, 511 F. 2d 316, & n. 7, (Eighth Circuit 1975).....pp-a2

Gronquist v Olson, 242 Minn. 119, 125, 64 N.W. 2d 159, 163.....pp-c8,d9

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City of New York, 502 F. 2d 631,
(Second Circuit 1974).....pp47,54, 55

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430 F. 2d 862, (Fifth Circuit 1970).pp46
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City of New York, 508 F. 2d 277,
(Second Circuit 1975).....pp47,54,55

Ney v California, 439 F. 2d 1285,
(Ninth Circuit 1971).....pp46,55

Olson v Regents of University of
Minnesota, 301 F. Supp. 1356,
L.Ed. 2d 548 (1972).....p-c6

Perry v Sindermann, 408 U.S. 593,
92 S. Ct. 2694, 33 L.Ed. 2d 570.....p47

Rice v Sioux City Cemetery, 349 U.S.
70 (1955).....p-f2

Rogalla v Rubbelke, 261 Minn. 381,
112 N.W. 2d 581.....p-d11

Schware v Board of Bar Examiners,
353 U.S. 232, 238.....p49

Scripto v Carson, 362 U.S. 207,
(1960).....p-f1

Sherk v Alberto-Culver Co.,
___U.S.___, (June 1974).....p64

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364 F. 2d 590 (Eighth Circuit 1966)...b2

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Whitner v Davis, 410 F. 2d 24,
(Ninth Circuit 1969).....p55

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Wisconsin Board of Regents v Roth,
408 U.S. 564, 92 S.Ct. 270, 33 L.Ed.
2d 548.....pp34,47,48,49,57,58,c6

Columbia Law Review 49:153.....p43

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Rosenblum, Victor G., "Legal Dimensions of Tenure," Chap. IV, in Academic Tenure, Commission on Academic Tenure in Higher Education, Jossey-Bass Publishers, Washington D.C., 1973, p. 160-193.....p48

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University of Colorado Law Review 44:191 (1972), Neil W. Averitt. pp42,43,44,54,56

University of Miami Law Review 24:835 p-43

United States Supreme Court, Rules of the U. S. Supreme Court, Adopted June 15, 1970, Effective July 1, 1970 with revisions to December 1, 1971, Thiel Press, Inc., 1422 K. Street, N.W., Washington, D.C., 2005

Vestal, Allan D., Res Judicata/Preclusion, Matthew Bender, New York, New York, 1969

Wisconsin Law Review 74:1180-94 (1974) p-43

Wright, Charles Alan, Federal Court, Hornbook Series, West Publishing Co., St. Paul, Minnesota, 1963 .....p44

QUESTIONS AND ISSUES

1. Shall res judicata effects apply in this instance of federal court action under Civil Rights Section 1983 having prior state court judgment?

   a. What are the suitable guidelines to be used?

   b. Was Section 1983 applied in State Court judgment?

   c. Have plaintiff's due process and equal protection rights been violated by the Court's failure to make application of Section 1983?

   d. What constructive judicial action should be taken to find the truth?

2. Shall the petitioner be granted a hearing before the Minnesota State University Board to consider his professional status?

   a. What remedial action should be taken by the Court?

   b. Shall the settlement agreement contract be set aside as "over-reaching" reasonable employment practice?

   c. Or shall the Board provide a hearing as is proper consideration for obligations imposed, so that a determination of what job might exist can be accomplished?

At first the controversy involved Burns' teaching position and the formation of a special-liason committee in science education in which he was instrumental in helping the college form. While the controversy originated in the College - Bemidji State University,[4] it has since developed into a dispute involving the Central Administration of the Minnesota State University System and the Board.

The Central Administration involved itself in the dispute when it chose to breach Board rules and by constructing a settlement agreement to restrict Burns on his right to seek employment in all of the state colleges (universities) and to limit him on what he can say to the public, the press or other officials concerning his employment at Bemidji State.

The case has received extensive judicial review in both state and federal courts, it is herein brought to the Court's attention a second time.

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[4]The Minnesota State Legislature has recently enacted into law changing the Minnesota State College System to that of a University System. In this petition the designations of college and university will be used interchangeably.

Initial Circumstances-

Professor Robert B. Burns was initially employed to work at Bemidji State College in science education. He brought with him the credentials of experience having lived and worked in many locations including three years of service in the United States Navy and travels in the Pacific and Mediterranian areas. When he and his family came to Bemidji in 1967 Burns had just completed all the requirements for the doctor's degree at the University of Florida. As part of his preparation for college and university work he had completed an extensive research project on the subject of children's constructive uses of scientific ideas.[5] He was a graduate also of the University of Illinois where he had earned a bachelor's degree in education in 1950 and a master's degree in counseling and guidance in 1952.

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[5]Refer "A Study of Children's Use of Interpretive Constructs" by Burns, Document Number 52 on file in Federal District Court, dissertation 68-9492, University Microfilms, Ann Arbor, Michigan, (The University of Florida, Ed.D., 1967, Education,Theory and Practice).

Developments the First Year - 1967-68-

Burns' position in science education involved teaching courses connected with several administrative divisions, the Education Division and the Science Division. He was to teach science methods, a class in conservation of our natural resources and serve as well in coordinating the science education program in the College's Laboratory School, k-6. During summer sessions he was to teach a class in child development as needed. This is what he understood based upon his initial job interviews with the College officials. He also thought that the position in science education generally had permanent possibilities, with successful performance of his duties and teaching, leading eventually to that of tenure status. He understood too based upon conversations with the head of Education that he was to have the rank of associate professor.

During the course of developments that first year there developed a serious question as to whether a job opportunity actually existed as initially understood. within a matter of days due to some uncertainty Burns was demoted in rank from associate to assistant professor without him knowing until it was too late to correct the misunderstanding. However, the question of a job existing soon became a question

whether or not the College wanted to form a science education department which would be located in the Science Division. And Burns was told that members of the Science Division were not actually in agreement with the Education Division's decision to hire him in the first place. By spring two-thirds of his job description was taken away from him and given back to Burns' immediate predecessor, an excellent science educator, who was being shifted from Field Services into the Science Division. To Burns this indicated to some extent the College's interest that science education be coordinated primarily from the Science Division.

But Burns began to wonder if the College administration really recognized or comprehended the investment involved in what new faculty members bring in the way of credentials. He was aware too that the College was experiencing certain difficulties due to the loss of their President who was killed in Vietnam on an important educational mission.[6] However, during his first year he didn't fully comprehend the important objectives

[6] See Burns petition for writ of certiorari from State Court Action in Burns v Decker, 416 U.S. 991, cert. denied (1974) Appendix J-page 6, a copy of which is on file in the Federal District Court.

of the College and in particular the difficulties existing between the Science Division and the Education concerning the prospect of forming a science education department.[7]

Developments the Second Year - 1968-69
The Science Education Committee Action

At the beginning of the second year Burns provided the College with a recommendation which subsequently led for the formation of a special-liason committee in science education. The committee was called the Science Mathematics Education Committee. It was to serve in development of new curricula and provide better communication between the two administrative divisions primarily involved - Education and Science. Shortly after the Committee's formation Burns was asked by his immediate superiors in Education to resign his next years appointment or face the consequences of receiving a letter of non-renewal of his employment contract. Burns felt that there was a breach in trust by the administration in that they had given him the responsibility in helping the College

[7] Id. Appendixes J and K on file in Federal District Court.

inquire into the feasibility of forming this special-liason committee.[8]

During the next several months in January and February Burns explored with the Chancellor's Office concerning his professional circumstances at Bemidji State College. On March 13th, he was advised that he should seek local review of his professional situation. On March 20th at a meeting held for this purpose, Burns was fired outright by the College President from whatever position he thought Burns might have had. On March 21st the President notified Burns that his employment contract was being terminated as of March 24th. (Burns' contract was not to have ended until June 11th).

Approximately thirty days later Burns requested a hearing before the State College Board. He had not received any official communication from the Board regarding the President's action. The Chancellor of the College System thereupon informed Burns that his request for a hearing could not be granted because it was untimely and should have been made within ten days of the notice of dismissal.[9]

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[8] Id.

[9] Refer Plaintiff's Document Number 6 Letter 5-13-69 on file Federal District Court.

Developments the Third Year -
The Science Education Papers in 1970-

For many months Burns tried to secure employment but was unsuccessful and the controversy increasingly spun-downward professionally, his status unknown, until circumstances developed to a matter of Burns being pushed and shoved by a college president and the local county sheriff summoned to quiet the disturbance. And then later that year the controversy shifted to the chancellor's office direct and Burns trying to get help was actually put in jail.[10] (This was an entirely new kind of credential for Burns!).

Fortunately during the winter the dispute shifted toward more professional aspects. Burns prepared a number of professional papers on the subject of science education committee matters in an effort to articulate better the developments of the preceding years in science education.[11]

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[10] Refer Plaintiff's Document Number 7 Letter 11-26-69 on file Federal District Court.

[11] Refer Plaintiff's Document Number 8 - 2-22-70 on file Federal District Court.

The Science Education Papers were conveyed to the Committee, as well as the Vice President in Charge of Academic Affairs, the College President and the Chancellor of the College System. In May of 1970, the Science Mathematics Education Committee met to consider some of the ideas and recommendations contained in the twenty-three page document prepared by Burns entitled "A Critical Analysis of Science Education - Bemidji State College."[12]

The Fourth Year - The Settlement Agreement Action - December 1970-

Later in 1970 Burns resumed his efforts to secure a hearing before the Board feeling that important College interests were involved and more than just his own professional status. But there was a much more serious question concerning the

[12]Refer Plaintiff's Document Number 9 on file Federal District Court. (Within the discretion of the Court's interests regarding the subject of campus unrest generally, reference is made to Document Number 10, 6-19-70 Congressional Record, Number 11 and 12 which concerns the transmission of information to President's Commission on Campus Unrest).

breaching of Board rules. While the outright firing could not effectively remove Burns from the responsibility concerning the science education committee assignments, breaching Board rules was effectively obstructing the opportunity for a determination of possible College interests over and beyond Burns' professional status.[13]

Requests were made repeatedly by Burns for a hearing during the autumn of 1970 but without success. Burns had talked with the Board's President concerning the science education committee and the undemocratic actions by the College Administration. But in December a settlement agreement action took place which was presumably for the purpose of mending Burns' tattered professional status as well as attending to some extent to the due processes of the law regarding the science education committee. Burns was not particularly aware that the agreement was for the purpose of repairing any breach of Board (rules by the Central Administration) of the College System for it was explained to him that it was he who had not complied with the rules not the Chancellor. Burns not knowing the Chancellor had breached Board rules signed the settlement presented

[13] See "Politics in Colleges and Universities", resume', in Appendix H of this petition, herein.

to him (given only 24-36 hours), (that or nothing) on December the 17th and hoped that what was already a lengthy controversy with the College was being brought to a constructive conclusion.

The same day Burns had written to the Chancellor that he appreciated the attention by the college officials to the due processes of the law. And the College President had written also on the seventeenth that Burns had at least been partially successful in helping the College in bridging the gap between the scientists and educators and did make them aware that a science education difficulty existed.[14]

But shortly thereafter Burns changed his mind regarding the settlement agreement because of certain untenable restrictions on his right to seek employment in the future. On January 26, 1971 he withdrew from the settlement considering that he had the option to do so. A few days later he spoke to the President of the Board in his office. The restrictions contained in the settlement agreement, Burns explained, appeared to be just the

[14]See Settlement Agreement, Appendix E of this petition. Refer also Plaintiff's Documents Number 13 and 14 on file in Federal District Court.

opposite of what he thought was intended. (As part of the agreement he was not to seek employment in any of the state colleges including Bemidji and further he was restricted on what he could say professionally to the public, officials or the press). While he considered that the agreement document was an unrecognizable employment credential he did not learn from the President of the Board any more that would help him understand just what the settlement meant. It was not possible for Burns to know what the Central Administration's position was, not knowing that the rules of the Board had been breached by them.[15]

If the intentions of the college officials were not constructive then the agreement was totally unacceptable for it went beyond reasonable bounds of employment practice and was accordingly an encroachment on his professional rights and privileges. If on the other hand the college officials were actually intending to be positive and constructive in their settlement then the agreement represented some kind of employment contract in need of a hearing in order to determine just what job might exist.

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[15] Refer Plaintiff's Documents Numbers 25-33 on file in Federal District Court.

Many weeks after Burns had withdrawn from the agreement he received U. S. Mail the settlement papers including the contract money due him on his original employment contract. Not knowing just what the agreement was, Burns returned these papers together with the warrant for the sum of sighteen hundred dollars by U.S. registered mail. He then proceeded to search the professional justification for a hearing before the Board. He communicated extensively with the Board concerning the professional reasons why a hearing should be conducted. He also contacted College officials to explore with them job possibilities. But no jobs were likely available.[16]

In May Burns requested a hearing by letter conveyed to the Board. On May 18, he was informed that the Chancellor would act on his request immediately. No action was taken immediately, however, but Burns was later advised by the President of the Board that he should explore possibilities of a hearing with the Chairman of the Rules and Appeals

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[16]Refer Plaintiff's Documents Number 15-24 on file, Federal District Court.

Committee. After extensive communications with much documentation provided by Burns he was informed by the Chairman that his request for a hearing was denied for obvious reasons.[17]

Developments the Fifth Year
Official Board Action-

Burns not knowing what the obvious reasons were went directly to the Board at its first annual meeting held on August 23, 1971. He stated in his request for a hearing that the major basis for the proposed hearing was the significances of an earned doctorate from an established and recognized university and that at a minimum teachers having such new credentials in their initial employment should expect to have at least one reasonable year to teach beyond graduation, and if such job opportunity did not exist then it was appropriate that a hearing before the Board be conducted to determine why.

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[17] Refer Plaintiff's Documents Number 25-27 on file in Federal District Court.

By letter August 26, 1971 the Board informed Burns that under the circumstances of his dismissal at Bemidji and as provided by the rules, regulations and practices of the Board, a dismissal was a delegated power granted to the respective colleges in the state college system and accordingly the Board would not reverse the decision of Bemidji State College and would not grant a hearing. In September the Board at its second annual meeting passed its official resolution not granting Burns' request for a hearing. This resolution was amended providing for Burns to have an opportunity to make a statement for the record.[18]

[18]Refer Plaintiff's Documents Number 28-33 on file in Federal District Court.

Summary of Case Developments During Progress of Judicial Proceedings State and Federal -1972-75-

Believing that his employment rights had been seriously violated and his professional reputation damaged as well, Burns filed complaints in the State District Court located in Bemidji in February of 1972 and thus commenced what was to become a lengthy battle in the courts concerning the Burns Case put before the Minnesota State College Board. There would follow many months of judicial proceedings, in fact years.

During the years to follow there would be a number of direct confrontations between Burns and the Board. The attention of individual Board members and the Board in session would be drawn to the subject of reasonable employment practice, what constitutes a reasonable opportunity for beginning teachers and the nature of a reasonable settlement in view of breaches in employment contract and breaches in their own rules by the Central Administration. But perhaps more important was the issue of what new teachers bring to a college in the way of credentials and the important initiatives they will provide given a decent opportunity.[19]

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[19] Refer Plaintiff's Documents Numbers 37, 46, 48, 49 on file in the Federal District Court.

During the State District Court proceedings Burns attempted to communicate to the public some of the issues involved, by walking the streets with a placard. The "picketing" was more directed toward the State College System's Central Administration. The State District Court was not, however, that suitable "forum" for handling the important issues, particularly such issues as that of earned degrees from established schools in relationship to the unreasonable restrictions on Burns right to seek employment in the state colleges in Minnesota.

During the Federal Judicial proceedings Burns provided the Board with several status reports on the judicial issues involved but pointing out that a State College Board should not expect the highest court in the land, the United States Supreme Court, notwithstanding the important judicial issues that might be involved, to tell them what to do.[20]

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[20] See Appendix I - "A Judicial Application in External Governance Procedures - An Illustration", herein. See also Appendix H - "Politics in Colleges and Universities." Refer Official Board Minutes, May 27 and August 19, 1975 which are not on file in the judicial proceedings - "The Burns v Minnesota State College Board, Case Description, Status and Request for a Hearing" and "Letter" for "Informational Purposes", respectively.

POOR COPY

State District Court Proceedings[21]
Ninth Judicial District
Beltrami County, Bemidji,
Minnesota-

The plaintiff's original complaints centered on the defendants' breach of his employment contract and their violation of his due process rights to a hearing as provided by the rules and regulations of the State College Board. Judicial action was therefore commenced because of these violations.

The complaints were served in February of 1972 and the defendants moved to delay answering until a deposition was taken on the plaintiff. The plaintiff was interrogated for approximately six hours by two attorneys representing the defendants. A summons requesting a deposition on the defendant chancellor was served and quashed by the Court. Nearly four months were required for the defendants' to answer.

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[21] Reference is made to State District Court Proceedings contained in Defendants' Memorandum of Law in Support of Motion for Order Granting Summary Judgment, dated Oct. 24, 1974, Exhibits Number 1-10. Reference is also made to Appendix D - pp. d1-d24, herein.

On June 22, 1972 the defendants replied that a valid settlement agreement contract existed which fully satisfied any and all claims which the plaintiff might have had. The plaintiff responded to the defendants' counterclaim that the settlement agreement was void for its unconscionable restrictions on his future employment and because of the erroneous-fraudulant representations contained in the agreement.

First the settlement agreement in Recital Number 5 had misrepresented plaintiff's rights that he had not requested a hearing within ten days after notification of the reasons for his dismissal as was required by the Board rules. Plaintiff's counsel contended that this was an erroneous interpretation of the rules. Since the reasons had not been given the ten days do not begin to run until such reasons are given.[22]

Second the settlement agreement misrepresented plaintiff's rights in

[22] See Appendix C p. c6 and Appendix E Recital Number 5, herein.

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Paragraph III C which stated that Burns by his own delay in requesting a hearing had waived any possible right he might have had to a hearing before the Board. Plaintiff's counsel contended that because of the erroneous interpretations Burns did not know what his rights were.[23]

Third the settlement agreement was void or did not exist for its unconscionable restrictions on plaintiff's future employment.[24]

On November 30, 1972 a summary judgment in favor of the defendants was entered. The Honorable James F. Murphy, District Court Judge stated that he considered the action herein was not brought for the purpose of setting aside the settlement agreement on grounds of fraud or duress, but was a claim for damages.[25]

Regarding the Civil Rights Acts under 42 U.S.C.A. § 1983 the Court did not construe this statute because of the Court's

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[23] See Appendix E Paragraph III C, herein.

[24] Id. Paragraph III A , herein.

[25] Refer Appendix D, herein, State Court Judgment - Findings of Fact, Conclusions of Law and Order for Summary Judgment Section III on page d5.

ruling on the release given in the settlement agreement. The Court made no mention of the restrictions on Burns' future employment in all of the state colleges of Minnesota.[26]

The District Court Judge felt that officials acting in official capacity are immune from liability for they were acting as officers of the College Board and were performing their duties under the laws of the State. The Judge considered that the defendant college officials were not personally liable for any errors of judgment or for acts done within the scope of their authority, unless if unnecessary and done corruptly or maliciously.[27]

Minnesota Supreme Court Opinion-

The judgment of the lower court was appealed to the Minnesota State Supreme Court giving notice on December 29, 1972. On September 19th, the oral arguments were presented. At this time the justices noted that the Board rules had not been

[26]Refer Appendix D. herein, State Court Judgment - Memorandum on page 4, d13.

[27]Id. Memorandum on page 5, d15-d16.

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followed and that no consideration was given for the restrictions on Burns' future employment.[28]

On November 23, 1973 the Court gave its written opinion. No mention of the issue of restricting the plaintiff's future employment or the lack of consideration thereof was made, however, the Court did interpret the operation of Rule 17 B (1,2) of the State College Board and stated: (Refer Appendix C, herein)

> "After reading the entire record and hearing the oral arguments, this court still does not know why plaintiff was originally discharged. It therefore seems clear that the State College Board did not comply with the above rule, which required the board, upon request of a discharged nontenure faculty member, to give 'reasons for dismissal' in writing. Under any reasonalbe interpretation of that requirement, such reasons should be given in such detail as to leave no doubt in the minds of those concerned of the 'cause' for the termination of the annual contract. Failing in this, the board was also derelict in not providing a hearing. The 'ten days' limitation mentioned in this rule does not begin to run until such 'reasons' are given."

[28] Refer Appendix F, Respondents' Argument, herein in First Petition to U.S. Supreme Court.

The Court noted that substantial issues have been recently raised by the United States Supreme Court as in Board of Regents v Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed. 2d 548 (1972) and that due process rights may be violated by the failure to provide a hearing upon request. The Court noted further that the Minnesota State College Board had now established a "complete and thorough procedure to be followed in the dismissal of a nontenured teacher." (The Court was comparing the 1971 SCB rules with the 1965 SCB rules)

The failure by the Board in the Burns' dismissal the Court felt was undoubtedly recognized by the Board and provided the basis for its agreeing to the settlement agreement. The Minnesota State Supreme Court described the settlement agreement as making the plaintiff financially whole, while no reference was made to Civil Rights or Section 1983 or to the unfair restrictions on Burns' right to seek employment in the state colleges of Minnesota as had been vigorously discussed during the oral arguments. The Court affirmed the lower court's judgment instructing the defendants to again tender the eighteen hundred dollar settlement check to Burns.[29]

[29]Refer Minnesota State Supreme Court Opinion Appendix C, herein, pages c5-c10.

First Petition to United States Supreme Court - No. 93-6417 Burns v Decker, 416 U.S. 991, cert. denied (1974)-

Believing that the important federal question concerning the restrictions on his future employment was not dealt with by the state courts Burns then petitioned the United States Supreme Court for a writ of certiorari. The defendants' argued that all issues had been settled, however, they noted that"the only possible issue of any substantive merit" was that of precluding Burns from further employment in the State College System." They also noted that the one of the Supreme Court justices was the enewho first raised such issue, which according to the defendants had not been previously raised and that "one" of the justices thought the restrictions "might . . . be a little over-reaching." "In any case, it was not considered by the (Court) in reaching its decision." They reasoned that "An issue raised for the first time on petition for certiorari and not considered by the trial court or the Minnesota Supreme Court is not reviewable." They cited the Helvering v Minnesota Tea Co., 296 U.S. 378 (1935).[30]

[30] Refer Appendix F - Section Entitled "Argument" page 3 of Respondents' Reply to Burns' First Petition, 416 U.S. 991 cert. denied (1974), herein.

Burns' petition for certiorari was denied on May 13, 1974. On June 17, 1974 the Court again denied the petition.

Federal District Court Action
Third Division, District of Minnesota-

This time Burns agreed with the defendants that the state courts had indeed not considered the Civil Rights issue of restricting his future employment opportunities. So on August 20, 1974 he again requested a hearing as provided by the rules of the Minnesota State College Board. Again, however the Board denied his request after their counsel reviewed the case noting that it was the first case on record in the State College System that had gone to the United States' Supreme Court.

In September complaints were served on the defendants by U.S. Federal Marshals costing initially the sum of seventy-five dollars, however, later there was a refund of nearly thirty dollars. The major complaint filed was under Count III that ". . . such written agreement conveyance is not the kind of recognizable employment credential any reputable state

college system in this land, (aspiring to be a university system conferring doctor's degrees), should bring to bear on any person, student or teacher, tenured or non-tenured, that such conveyance put forth by the State College Board officials was done in spite of the known fact that plaintiff had already achieved suitable credentials from the University of Florida . . ."

The defendants' answer was on the basis of prior state court judgment, that all issues had been decided. The plaintiff entered a motion requesting that they be more specific in answering his complaints. The defendants requested a summary judgment against the plaintiff. The plaintiff served the defendants forty-seven interrogatories in an attempt to secure information, however, the defendants' (as they had done in the State Court) requested a delay in answering these interrogatories until their motion for summary judgment was decided. On December 23, 1974 all motions before the Court were heard and on January 3, 1975 the Court gave a summary judgment ruling against Burns on principles of res judicata effects from prior state court judgment.[31]

[31] Appendix B, herein, b1-b2.

United States Court of Appeals
Eighth Circuit -

The matter was appealed to the United State Court of Appeals in January of 1975 and on July 17, 1975 a per curiam opinion was rendered by Justices Lay, Stephenson and Webster affirming the lower court's judgment.[32]

[32] Appendix A, herein, pages a1-a3.

39

REASONS FOR GRANTING CERTIORARI

I. General Considerations-

The Minnesota Supreme Court while recognizing that the Minnesota State University Board rules were breached in regard to Burns' employment rights did not go on to observe that important university and college interests were involved and not just Burns' professional reputation and status. Failing to note the involvement of the Central Administration in breaching Board rules, the state courts did not reach the significant merits of the case. It is therefore important that certiorari be granted in order that justice might be fairly and reasonably dealt with, the kind of justice that takes into account all sides in the controversy.

Because of the nature of the issue involved -- the significances of earned credentials granted by other schools to Burns prior to his initial employment and the significance of a settlement agreement sanctioned by the Minnesota State University System, these factors associated with the breaking of Burns' employment contract and breaching Board rules -- these issues are professional, certiorari should therefore be granted to provide an appropriate hearing before the Board in

order to consider those professional issues.

The case can serve a useful purpose for the Court to set new standards on what constitutes a reasonable employment practice. The Court in granting certiorari can provide educational insight as to what a reasonable job opportunity should be -- in times like these when the country is beset with serious economic and conservation problems with many persons who are talented and skilled out of work. The Nation could do well to hear what the Court has to say concerning the Nation's most important resource - the people, their skills, initiatives they will provide given reasonable employment opportunities, their talents put to constructive purposes given a decent chance. (A good proportion of these potentialities are generated by the schools, it is therefore important that the school as an employer represent the best business interests of the country thru positive employment practices that constructively utilize the "good products" created by other schools in the land).

A person goes to school to create skills of potential worth to society. Of course people go to school to enrich their lives in many ways, but never-the-less the

vocational goals are most important for they will want to be useful and productive members of society. Persons want to work to unleash those potentialities they've developed by going to school.

While a job opportunity does not provide a guarantee to a person's economic security as in some societies that seek controls economically that are risk-free, a job in this country should at least provide a reasonable chance at success. What kind of passport does it take in this country to secure a reasonable job when degrees from established and recognized schools lose their meaning and even "initiatives" that are constructive are not comprehended for what they are? Of course the case, herein, presented is only a case in point and should not be magnified by judicial review beyond its proper perspective.

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II. What Are the Suitable Guidelines in Applying Section 1983-

What kind of settlement do we have when administrative officials in higher education expect to settle their breaks

and breaches in contracts and Board-rules that require restricting a man's right to seek employment? The Burns' Case put before the Minnesota University Board is just that kind of case. But at this juncture it is possible that it might serve the judicial purpose in helping the Court in its clarification of the suitable quidelines that are needed to be used by the federal courts in reviewing selected Section 1983 Civil Rights cases having prior state court judgment.

Reference is made to Justice White's remarks in Florida Board of Dentistry v Mack,[33] in 1971. Justice White had noted that three federal circuits had suggested that the normal rules of res judicata do not always apply under Section 1983 actions, that it may be appropriate to treat Section 1983 cases as paralleling habeas corpus rights according to suitable guidelines.[34]

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[33]401 U.S. 960, 961-962, cert.denied, 91 S.Ct. 990, 28 L.Ed. 2d 237 (1971).

[34]Refer Harvard Law Review 88:453, at 456-457, (1974); see also University of Colorado Law Review 44:191 at 214, (1972).

While many cases can be cited that operate on the res judicata notions on the finality of litigation considering efficiency and economy in the judicial system, there are recent cases that show differences in judicial application. Extensive discussions found in many recent law reviews reflect the conflicting applications of Section 1983 cases having prior state court judgment.[35]

And still it should be observed that res judicata as an inflexible doctrine may serve as a worthwhile barrier for preventing notions of false economy or the idea that justice can be achieved easily. Mr. McGeorge Bundy states that ". . . in large measure it is right that law should be expensive, the notion of cheap justice is a mirage. . ."[36]

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[35] Reference is made to the following discussions: Columbia Law Rev.49:153; Fordham Law Rev.43:459-66 (1974); Harvard Law Rev. 73:1367 (1960),82:486 (1969),83:1352 (1970), 88 supra; Iowa Law Rev.60:973-990 (1970; Oklahaom Law Rev.27:185 (1974);Temple Law Quarterly 48:384-396; Univ.of Colarado Law Rev. supra;Univ.of Miami Law Rev.24:835; Wisc.Law Rev.74:1180-94 (1974).

[36] Refer Arthur E.Sutherland,Editor,Government Under Law, Harvard University Press, Cambridge,1956, at page 364.

Charles Alan Wright has observed that if a case is reviewable in the Supreme Court only by certiorari, and that writ is refused, the plaintiff will have been denied a federal adjudication of a federal question which Congress and the Constitution have said he may take to a federal court and" . . . if this is the result, then federal jurisdiction has been abdicated, not merely postponed." The resultant effects according to Wright can be escaped only by holding that a state court decision which the Supreme Court has refused to review on certiorari is not "res judicata" as is generally understood.[37]

When a case has reached a "state of repose" such that state courts have had an opportunity to interpret their rules in an orderly manner and to correct for mistakes thru remedial measures it is appropriate for the federal courts to have the final say regarding important civil rights matters. Niel W. Averitt suggests two other conditions for dealing

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[37] Charles Alan Wright's Federal Courts, Hornbook Series, West Publishing Co., St. Paul, Minnesota, 1963, p. 172.

with Civil Rights cases having prior state court judgment. He reinforces Wright's observation suggesting that the second requirement for suitable guidelines be that of providing every claimant one opportunity to present his case in a federal forum.[38]

The second requirement, related to the case herein presented, would not include those who chose the state court and those who could have removed to the federal courts but chose not to do so, " . . . but not parties whose only contact with the federal judiciary was a denial of certiorari . . . by the Supreme Court." (Emphasis added).[39] The third requirement deals with cases that have not been disposed of on an adequate and independent state ground. Averitt states that the third condition is intended to limit the scope of federal intervention but permit

[38] Neil W. Averitt's article entitled "Federal Section 1983 Actions After State Court Judgment" in University of Colorado Law Rev. supra, page 196.

[39] Id. see also Burns v Decker, 416 U.S. 991, certiorari denied, (1974).

rehearing for remedial measures which reach cases where the plaintiff has been wrongfully denied a federal right.[40]

Jurisdiction of the Court is premised upon differences in the application of Section 1983 among the federal courts. The judicial reason in granting certiorari might be for its potential benefit in serving as a "vehicle for propounding new standards of law."[41] Reference is made to the following cases which indicate that the usual notions on finality shall not operate in selected Civil Rights cases under Section 1983--Mack v Florida Board of Dentistry (S.D. Fla. 1969); Whitner v Davis, 410 F. 2d 24, (Ninth Circuit 1969); Mack v Florida State Board of Dentistry, 430 F. 2d 862 (Fifth Circuit 1970); Avins v Manqum, 450 F 2d 923 (Second Circuit 1971); Florida Board of Dentistry v Mack, 401 U.S. 960 supra; Ney v California, 439 F. 2d 1285, 1288, (Ninth Circuit 1971); Jackson v Official Representatives, 487 F 2d 885, 886 (Ninth Circuit 1973); Javits v Stevens, 382 F. Supp. 131, 142, (S.D. New York 1974)

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[40] Id. note Florida Board of Dentistry v Mack, supra.

[41] Refer Harvard Law Rev. 88 supra at 193.

(on authority of the Lombard Case); Lombard v Board of Education of the City of New York, 502 F. 2d 631 (Second Circuit 1974); Newman v Board of Education of the City of New York, 508 F. 2d 277, (Second Circuit 1975).

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III To Provide Justice Consistant with the Court's Previous Rulings-

Another important reason for granting certiorari is to provide justice consistant with the Court's previous rulings as in Wisconsin Board of Regents v Roth, (1972);[42] Perry v Sindermann, (1972);[43] Healy v James, (1972);[44] City of Kenosha v Bruno, (1973);[45] and Arnett v Kennedy, (1974).[46] In so doing the Court thereby

[42] 408 U.S. 564, 92 S Ct.270, 33 L.Ed. 2d 548, (1972)

[43] 408 U.S. 593,92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972).

[44] 408 U.S. 169, 92 S.Ct. 2338, 33 L.Ed. 2d 266 (1972).

[45] 409U.S.1109, (1973) related to Board of Regents v Roth, supra, and Perry v Sindermann, supra.

[46] 416 U.S. 134 (1974).

adds greater strength to the enforcement and implementation of its previous rulings by the lower courts.[47] Certiorari should be granted when the remedy available is consistant with the law.

IV Certiorari Should Be Granted to Prevent Future Threatened Injury-

The Court should grant this petition due consideration such as to minimize future threatened injury as in the impairment of plaintiff's professional standing, reputation and employment contracts. This would be consistant with the Court's opinion in Wisconsin Board of Regents v Roth, supra.[48] Justice Stewart stated:

> ". . . there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment

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[47] Refer Harvard Law Rev. 88 supra at 193, see also Victor G. Rosenblum, "Legal Dimensions of Tenure" in Commission on Academic Tenure, Faculty Tenure: A Report and Recommendations, Jossey-Bass Publishers, 1973.

[48] Page nine of the original slip-opinion in Wisconsin Board of Regents v Roth, supra.

> opportunities. The State, for example, did not involve any regulations to bar the respondent from all other public employment in State Universities. Had it done so, this, again, would be a different case. For 'to be deprived not only of present government employment but of future opportunity for it is no small injury . . . .' Joint Anti-Fascist Refugee Committee v McGrath, supra, at 185 (Jackson, J., concurring). See Truax v Raich, 239 U.S. 33, 41. The Court has held, for example, that a State, in regulating eligibility for a type of professional employment, cannot foreclose a range of opportunities 'in a manner . . . that contravene (s) due process,' Schware v Board of Bar Examiners, 353 U.S. 232, 238, and, specifically, in a manner that denies the right to a full prior hearing. Willner v Committee on Character, 373 U.S. 96, 103. See Cafeteria Workers v McElroy, supra, at 898."

Justice Stewart added that in Wisconsin Board of Regents v Roth that principle does not come into play.

In Burns v Decker, supra, as presented in the first petition which was denied for review in 1974 it was pointed out that Burns' employment circumstances follows closely the hypothetical case as Justice Stewart has outlined. Burns' right to seek employment in all of the State Universities has been foreclosed upon and in a manner that contravenes his due process rights and is no small injury. Certiorari should be granted consistant with the Court's previous rulings therefore. Certiorari should be granted to prevent threatened injury and the impairment of his future employment opportunity in the State of Minnesota. The Burns Case is not "hypothetical"!

If this were the only consideration it would be appropriate for the Supreme Court to summarily reverse with instruction to the Minnesota State University Board to grant Burns his request for a hearing. However as noted in Section II of this discussion of the reasons for granting certiorari are the important questions and issues on the critical need for suitable guidelines for Civil Rights matters, state and federal with regard to the application of Section 1983. As Bundy said "Justice cannot be

achieved cheaply."[49] Nor should a case be magnified out of proportion by judicial review. And it goes without saying that there is little justice in the denial of certiorari for by such refusal the Court obstructs dealing with the important professional matters involved.

Lest we all are to become delinquents in this society the Court should deal squarely with the subject of what constitutes reasonable employment practice. There has been far too heavy an emphasis on the achievement of tenure status in this society and not enough on the importance of new people in new jobs that expect a decent chance. Our youth are shelved for deferred purposes it is often said, but little attention is given to the graduate upon his or her commencement except if it is on "graduation day." This is not to suggest that the American-tradition of knocking the "chip" off the "block" doesn't have its proper place. None-the-less the "chips" from the school must be respected and the initiatives generated comprehended with constructive views in mind. What passport does it take for a decent chance?

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[49] Government Under Law, supra, p. 364.

V To Grant Certiorari for Determination of an Implied Contract at Law-

Certiorari should be granted in order to more carefully examine the significances of the settlement agreement not only in terms of the original contract of employment but also in terms of the rules and regulations of the Minnesota State University Board and what is generally understood regarding fair employment practice.[50]

The 1965 SCB Rules applicable to Burns specify that when a hearing is requested termination shall not occur until such time as a hearing is conducted. On the other hand the settlement agreement by its restrictive covenants in effect represents an extension of the Board rules and regulations for an unspecified duration of time and for an unspecified range of employment.[51]

Ordinarily a teacher's employment contract limits a teacher's employment elsewhere during the duration of the employment contract. Contracts, however,

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[50]Refer Minnesota State University Board Rules SCB 1971 - 201, 202, 203, 209.

[51]Refer Appendix E, Settlement Agreement, Paragraph III A and B, page e3.

do not limit a teacher's future employment. Rules and regulations do generally limit what a teacher employed can say professionally when speaking of the school.[52]

The settlement agreement on the other hand does not indicate a specific job and rather instead restrictions on employment are given and limitations on what can be said to the public and the press are given as well. Certiorari should therefore be granted with that constructive view in mind to determine what implied contract exists.

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[52] See 1965 Board Rules SCB 13 (C) and 1971 SCB 203

I

SHOULD A DENIAL OF CERTIORARI IN STATE ACTION FORECLOSE PLAINTIFF'S RIGHTS UNDER SECTION § 1983 IN FEDERAL COURTS?

The denial of certiorari from the Minnesota Courts should not foreclose plaintiff's right to have a federal adjudication of his federally protected rights.[53] In Burns versus Decker (1973)[54] the state courts did not apply plaintiff's constitutional due process rights, Amendment XIV, nor did they construe and apply Section 1983 in reaching their independent decision. They completely ignored the issue of restricting his future employment in the state Colleges (Universities) in Minnesota in reaching their decision.[55]

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[53] Refer Burns v Decker, 416 U.S. 991, cert. denied (1974); Mack v Florida Board of Dentistry, 401 U.S. 960, cert. denied (1971) supra, refer also Wright, supra, p. 172 and Averitt, supra, p. 196.

[54] 212 N.W. 2d 886, (1973)

[55] See Appendix C and D. opinion and judgment, state courts, herein , c5-c6, d4, d9, d13. See also Lombard, supra, Harvard Law Rev. 88 supra, policy considerations, 457,58,59; Newman, supra, Javits, supra, related to Lombard decision; see as well Averitt's "guidelines" supra in Colorado Law Review p. 195-198 "A Proposal" Section II.

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The differences existing between the Eighth, Ninth, Fifth and Second circuits indicates that the Court needs to clarify its position with respect to suitable guidelines needed in the pursuit of equitable justice.[56]

The importance of state courts interpreting their own state regulations is recognized by the federal judiciary and understood that it is in this way that a state has the opportunity to correct for any mistakes of its own existing authority.[57] It is equally

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[56] Refer Burns v Decker, Eighth Circuit per curiam, Appendix A., refer also Whitner v Davis, supra (Ninth), Ney v California, supra (Ninth) Mack v Florida Board of Dentistry, supra (Fifth), Avins v Manqum, supra (Second), Lombard v Board of Education City of New York (Second), Javits v Stenvens, (1974) supra, Newman v Board of Education City of New York (1975) supra, (Second) (Circuits, respectively), and there are still others see law reviews previously mentioned.

[57] Refer Appendix C and I on External Governance Procedures, c4-c7, i1 to end. See Averitt, supra, state courts inherent potential for bias, 191,192. Note in Appendix C, page c10 "Mr Justice ((former Minnesota State College Board Member)) MacLaughlin took no part in the consideration or decision of this case."

important that the federal courts have the final say regarding the application of federal law.[58]

It is the responsibility of the federal judiciary to decide what is law in conformity with the written Constitution (Marbury v Madison, 1 Cranch 137 (1803), for in our constitutional philosophy "it is a constitution we are expounding." M'Culloch v Maryland, 4 Wheat 316, 407 (1819).[59] Where the federal courts differ in their application of Section 1983 Civil Rights Cases having prior state judgment suitable guidelines are needed to be discerned by the Court to achieve greater consistancy and equality before the law.

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[58] Averitt, supra, p. 196.

[59] Quotations cited in Government Under Law, Justice Felix Frankfurter, p. 8, Professor Andre' Tunc, p. 37 and Chief Justice Warren p. 572 speaking.

ARGUMENT

II

PETITIONER'S DUE PROCESS AND EQUAL PROTECTION RIGHTS HAVE BEEN UNDULY VIOLATED

Persons go to school to build the skills, the talents, the potential so that they can gain access the market of worthwhile employment and so that they can be productive members of society. Such property interest in credits earned, degrees achieved shall not be "arbitrarily undermined" or "unfairly taken away" by employers not following procedural safeguards.

Justice Powell and Blackmun cited the following in Arnett v Kennedy, supra, (1974) from Roth, supra (1972) that:

> ". . . It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined . . ."

The government cannot confer or take away without following procedural

safeguards.[60]

The defendant college system officials have sanctioned the taking of Professor Burns' property rights to work without authority and not following reasonable due process procedures. Now it is particularly important that a State University Board not subscribe to employment practices which undermine what other established and recognized schools have created.[61]

The defendant officials are insisting upon an unconscionable settlement contract and were attempting in 1970 to do this knowing that they had not complied with the rules.[62]

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[60] Arnett v Kennedy, supra, p. 4 of original-slip opinion and as originally stated in Wisconsin Board of Regents v Roth, supra at 577, see Board Rules 1971 SCB 201, 202, 203, 209, 404.

[61] See Plaintiff's Document Number 1-3 on file in Federal District Court.

[62] Burns v Decker, 212 N.W. 2d, supra (1973), see Appendix C, page c6, herein.

This unfair employment practice, notwithstanding those important provincial interests, is not only against what other schools are doing but is not in agreement with the policies of the State University System to encourage the independent autonomous development of each of the separate state universities in the Minnesota System.[63]

In the state court proceedings these defendant officials have argued that the settlement settled any and all claims Professor Burns might have had regarding his employment at Bemidji State University. They have asserted that the sole basis for the settlement agreement was because of some possibility they might have wrongly interpreted the Board rules and may have misled Professor Burns and that they may have misunderstood what beginning teachers rights were in regard to having reasons for dismissal and a hearing provided according to Board rules.[64]

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[63] Refer Board Rules 1965 and 1971 on file Federal District Court; see Board-letter footnote 18, herein.

[64] Refer Respondents' Brief in Burns v Decker, supra, (1973) pages 5-6 on file in Federal District Court.

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When a teacher is struck down by an administration of a College is it right to strike him down a little further by refusing to provide him his rights to a hearing? This is serious all right but after fifteen months of not having his due process rights made available to him and then to strike him down still further attempting to restrict his future employment, this is no "small injury," it is thoroughly unconscionable. (See Justice White's remarks in Arnett v Kennedy, supra, that at some point a hearing shall be required).

III

JUSTICE AND COMMON SENSE

Is it reasonable to expect teachers to move from one community to another, hither, every time there's a difference of opinion concerning some job? To be a good teacher it is necessary that the teacher stay in one location a reasonable length of time in order to be that worthwhile teacher.

I have always believed and still do believe that when a teacher provides constructive initiatives, great or small, that may upset some of those provincial attitudes or static-forces there are important interests over and beyond those vested interests of the parties clashing.

Now the res judicata argument is an old familiar refrain often used after the teacher is fired and even before, especially by those in recognized and established positions in a college community. They will say, "Why don't you go some place else, isn't it better, more economical, isn't it better for everyone concerned?" And sometimes they say "You're not wanted!"

While the res judicata argument is most often an acceptable kind of reasoning, "lets settle our differences amicably", "lets not fight yesterdays battles over again," it is not always applicable and

not at all when important interests are involved. Nor is it applicable when a man, his wife and kids want to settle down and direct that steady effort to that important business of living and working in a community.

If a teacher is to become a valuable teacher it doesn't take degrees and extensive research in school to know that the teacher cannot be a good one, drifting from job-to-job. This is true in any business. There are limits in this society to shelving people and problems for deferred purposes by sending them packing. Certainly a person having gone to school achieving all the so-called established and recognized degrees should not be too easily sent upon his way when a few people think that it might be the best kind of settlement from their established and recognized positions in a college community for example.

Nor is it r e a s o n a b l e for a University System to subscribe to secret settlement agreements on their teachers that require a teacher's removal from an entire state school system to settle differences and doing this expect not have to follow reasonable due process procedures either. Isn't it more suitable to take the time

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to thoughtfully consider all sides thru appropriate due process hearing procedures to determine what suitable employment possibilities might be open for that person.

While it is purely human to make mistakes, and to go right on making them even, it is not so purely human to keep on going without at some point reviewing the professional circumstances and possible college interests with the thought of being reasonable and constructive. We cannot erase past mistakes, but we can take steps to correct for mistakes.

No person or individual protagonist speaks authoritatively in defense of a College's interests in such secret under-the-table settlement agreements. The College interests can only be safeguarded by following the Board rules and regulations that are established with that purpose in mind. The College interests cannot be protected by circumventing Board rules.

Now the Minnesota State University Board has a special interest in that it required nearly a year and a half to fill the vacancy of the presidency of Bemidji State when its president was killed in Vietnam in 1967. The Rules are established for the unexpected events for the purpose of serving in the protection of those important educational interests that go beyond a given administration's tenure.

The dispute which developed at Bemidji took place prior to the present administration, the Burns' firing occurred prior to the Inauguration Ceremonies of Bemidji's

new president. Both the Central Administration - the Chancellor and the Administration of Bemidji State were new administrations.

The Minnesota State University Board has that important responsibility to see that the rules are complied with, the same as the Chancellor and everyone else in the System, excepting that it has the final authority. It is the Board's important responsibility to see that each of its separate Universities are consistant in their total being. Where a controversy exists it is important therefore for the University Board to be fair and reasonable in following its rules.

However, sometimes it is necessary for external governance procedures to take place as in the case presented, herein to the Court's attention. The due-process hearing requirements of the Minnesota State University Board, 1965 and 1971, are relevant to the Court's recent ruling concerning an "international agreement" in which certain protective covenants for arbitrating disputes when the need arose as in Scherk v Alberto-Culver Co., ___U.S.___, (June 1974), slip opinion, in Syllabus p.II. The Court determined that the contract clause requiring an arbitration of the dispute must be fully complied with, in the case herein, it would appear that the Rules of the Board provide a due process clause in circumstances where there is a contract-dispute which was not applied in any reasonable manner.

POOR COPY

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It was common sense right from the first painful efforts in the founding of this Nation that a citizen should not be unduly encroached upon by government organization, neither foreign nor domestic.[65] In the development of this Nation the struggle continues, there is no res judicata! It is not the tarnished land beneath our feet that the "new" pioneers, modern researchers or technological "settlers" are struggling with these days so much as for the "territory" of the individual's skills and talents put to constructive purposes in community life. This is the kind of "property" interests important to people -- this is the kind of common sense that should be operating today across this land beneath our feet, "Soul-brother-real", if man's enterprises are to be constructive and useful.[66]

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[65] Nevins, Allan, Henry Steele Commager, A Short History of the United States, Alfred A. Knopf, New York, Fifth Edition, Revised and Enlarged, 1966, Chapter 1 "The Planting of the Colonies" section "The Early Settlers" pp 8-16; Chapter 4 "The Revolution and Confederation" sections "Independence" and"Marches and Battles" pp. 97-104.

[66] Id. Chapter 18 "The Age of Reform" sections"The Challenge to Democracy"-"The Crusade for Social Justice" PP. 382-392, Chapter 20 "Social Thought", (refer William James, John Dewey Philosophy) pp. 425-428. See Appendix G footnote #73, herein, and Appendix H also.

IV.

IS THERE AN IMPLIED CONTRACT?

While it was the purpose of the settlement agreement contract that there should be a constructive settlement of differences it was known that because of certain untenable restrictions on Burns' right to seek employment and his right to speak openly regarding his previous employment at Bemidji State University that Burns withdrew from this agreement. It was not immediately comprehended just what the significances of the settlement agreement were actually since it was to be an amicable one presumably. There were some substantial reasons why Burns could not understand such settlement agreement contract even though educated and knowledgeable.

The settlement agreement was understood to be an effort to mend a breach of Burns' employment contract and the differences which might have existed between the Bemidji State officials and Burns. It was not understood that the agreement was for the purpose of satisfying any breach of Board rules by the central administration of the college system. (If there was any rights violated or breached in regard to the rules, Burns had no way of knowing. As far as he knew the College had complied with the procedural rules of the Board).

Without a hearing being provided there was no way to determine whether the administration or Burns was correct. The settlement was to provide that the dismissal for cause proceedings should be dropped and Burns would be paid most of what he might have earned on the original contract.

It was understood also that Bemidji State's administration would write a letter that might be helpful to Burns in securing employment. The letter would explain that his termination was by some mutual agreement and that he had been helpful to the College in bridging the gap between the scientists and the professional educators.[67]

But the state courts have since extended the purposes of the settlement agreement through inferences made to include that the agreement was for any possible breach of Board rules. While such interpretation can be readily inferred, the courts have failed to note that the agreement they have construed, irrebutably so, that it might have been misleading to Burns.

The State Courts have failed to note that the agreement contract reads that Burns had already waived any rights he might have had to a hearing before the Board. It might be argued that Burns was "agreeing" to "agree" to this fact even though it

[67] Refer Appendix E, Letter from President Decker, page e5, herein.

was not correct.[68]

The Agreement Recital Number 5 was misleading as well. It pointed out factually that Burns was not entitled to a hearing in that he had not requested a hearing within ten days after notification of the reasons for his dismissal as required by Board rules. Again it might be argued that such letter was a fact in that it was sent, and accordingly it was not "deceitful", however, the difficulty lies in that the interpretation of the rules contained in the letter from the Central Administration was erroneous.[69]

The State Supreme Court has since carefully construed the applicable Rule 17 B and concluded that the rules were not complied with by the Board. They reasoned that it was for this purpose, "expost facto" that the settlement was intended.[70]

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[69] Id. e1, refer also Appendix C, c6, State Supreme Court Opinion, herein.

[70] Appendix C, "This failure to comply . . ." page c7, herein, see Appendix E, Recital Number 5 and Paragraph III C in Settlement Agreement, e1 and e4.

Now while the state courts have extended the interpretation of the settlement agreement to include purposes for satisfying breaches in rules by the administration as well as in the employment contract they have not taken into account that no consideration was given for breaching Board rules and for securing the restrictions on Burns' future employment. Nor have the state courts observed that the settlement contract extends the Board rules beyond reasonable employment practice by restricting his future employment and limiting him on what he can say. Failing to account for this the courts have not recognized that here is an implied contract at law which is defined by the burden and obligations so imposed.[71]

While an implied contract at law does not define an employment opportunity as such, it does indicate the need for the proper consideration of the obligations imposed. Accordingly, implied is a contract for a hearing in order to determine what job if any might exist.

---

[71] Refer Contracts Implied by Law 17 § C.J.S. 4 and 6.

The Minnesota Supreme Court has already carefully examined the Board rules applicable and found the due process procedures breached. It would therefore be an equitable construction of the settlement that a hearing be provided and particularly in view that the contract extends the rules of the Board regarding employment for an unspecified range and time and limiting what can be said, professionally and otherwise.

The implied contract at law therefore is a contract providing consideration in the form of making an appropriate due process hearing available to Professor Burns. Hopefully such construction might include a full consideration of all professional issues that were prevented from being considered by mistakes previously made in complying with the rules of the Board.

CONCLUSION

The Court should reverse its previous denial of certiorari and grant this petition forthwith to consider all issues regarding Civil Rights under Section 1983 having prior state court judgment in the case herein presented,

Or the Court within its own discretion may reverse its prior denial of certiorari and summarily reverse the judgments of the lower courts in the interest of justice with instructions that either the settlement contract be set aside on the basis of its unreasonable covenants contained therein and because of a misunderstanding by the parties concerning the obligations so imposed with all rights and privileges then in existence preserved accordingly,

Or order a hearing forthwith on the basis of due consideration required according to the rules and as defined by the obligations for the purpose of determining what employment opportunities, if any, might exist within the State University System for Burns. Consideration should also be given for reinstatement of Burns immediately pending such hearing consistant with the law.

APPENDIX

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 75-1150

Dr. Robert B. Burns, *
*
Appellant, * Appeal from the United
* States District Court
v. * for the District
** of Minnesota
Dr. Robert D.Decker, *
President,Bemidji *
State College; Dr. *
G. Theodore Mitau, *
Chancellor, Minnesota *
State College System; *
Dr. Frank G.Chesley, *
President, Minnesota *
State College Board, *
*
Appellees. *
*

Filed: July 17, 1975

Before LAY, STEPHENSON and WEBSTER, Circuit Judges

PER CURIAM.

Dr. Robert B. Burns appeals from an order granting summary judgment against him. The district court, the Honorable Edward J. Devitt, Chief Judge, United States Dictrict Court for the District of Minnesota, held that Burns' complaint was

barred by the doctrine of res judicata. We agree.

The facts are generally set out in the Minnesota Supreme Court's opinion reported at 212 N.W. 2d 886 (Minn. 1973). That court held that the parties had entered into a settlement agreement releasing any right to claims arising out of Dr. Burns' dismissal from Bemidji State College.

A review of the pleadings in the state court and those in the federal district court reveals that Burns' federal action states the same basic contentions, including 42 U.S.C. § 1983 claims,[1] as did the state action. Appellant is not entitled to raise those contentions for a second time in federal court. Towle v Boeing Airplane Co., 364 F 2d 590 (8th Cir. 1966). We are satisfied that all issues raised in this case have been previously decided by the state court.

Under the circumstances we find that the question presented does not require further argument. 8th Cir.Rule 9 (a).

---

[1] This court has given res judicata effect to issues previously decided by a state court in 1983 actions. See Goodrich v. Supreme Court of State of South Dakota, 511 F 2d 316 & n. 7 (8th Cir. 1975).

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

(Not to be published.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

DR. ROBERT B. BURNS
Plaintiff,

vs.

DR. ROBERT D. DECKER, President, Bemidji State College; DR. G. THEODORE MITAU, Chancellor, Minnesota State College System; DR. FRANK G. CHESLEY, President, Minnesota State College Board,

Defendants.

3-74-Civ.246
MEMORANDUM & ORDER

ROBERT B. BURNS, pro se.

WARREN SPANNAUS, Minnesota Attorney General and MICHAEL J. BRADLEY, Special Assistant Attorney General, St. Paul, Minnesota, and PHILLIP D. NELSON, Special Counsel to the Attorney General, Bemidji, Minnesota, attorneys for defendants.

The issue raised by defendants' motion for summary judgment filed under Federal Rule of Civil Procedure 56 is whether plaintiff's lcaim here is barred by the res judicata effect of a previous

state court judgment in an action between these same parties.

We find that the Minnesota Supreme Court has rendered final judgment on what is essentially this same cause of action. Burns v Decker, 212 N.W. 2d 886 (Minn. 1973). In such cases, a second suit involving the same parties or their predecessors is barred under the doctrine of res judicata. Towle v Boeing Airplane Co., 364 F. 2d 590 (8th Cir. 1966).

THEREFORE, defendants' motion for summary judgment must be and hereby is

GRANTED.

Dated: January 3, 1975

/s/ EDWARD J. DEVITT, Chief Judge
United States District Court

/s/ Bernadine Brown
Asst. Clerk

APPENDIX C

MINNESOTA STATE SUPREME COURT OPINION

NO. 238 Beltrami County

Scott, J. Took no part; MacLaughlin, J.

Dr. Robert B. Burns,

Appellant,

44138 VS.

Dr. Robert D. Decker, Minnesota State College Board, et al,

Respondents,

S Y L L A B U S

1. Upon discharge of a nontenured assistant professor of education under the jurisdiction of the State College Board, such teacher should be fully informed of the board's available rules of procedure, and if he requests that they be utilized, full compliance by the board with these rules of procedure is necessary for the protection of the dismissed party's rights. Due process rights may be violated by failure to provide a hearing requested under said procedure.

2. Where a settlement agreement is entered into between well-educated individuals and the record discloses that the parties completely understood both the scope and ramifications of the proposed contract at the time of its execution, the law finds that an alleged

wrong has been satisfied and recognizes an obligation to prohibit further action by upholding the settlement agreement.

Affirmed.

Heard before Knutson, C. J., and Kelly, Todd, and Scott, JJ., and considered en banc.

O P I N I O N

SCOTT, Justice.

Plaintiff appeals from a summary judgment of the district court. We affirm.

Plaintiff, Dr. Robert B. Burns, was initially employed by the Minnesota State College Board on a nontenured basis in the summer of 1967. He subsequently acted as an assistant professor of education at Bemidji State College for a period beginning September 16, 1968.

At a meeting on December 6, 1968, plaintiff was informed that his contract would not be renewed for the ensuing year, and on December 8, 1968, he wrote a letter of intention to resign. Plaintiff remained on the payroll however. On March 21, 1969, defendant Robert D. Decker, presidnet of Bemidji State College, sent plaintiff a letter stating that as of March 24, 1969,

his services would be terminated for alleged cause as a result of his record at the college and his conduct at a meeting on March 20, 1969.

During the following months, plaintiff repeatedly requested the State College Board to modify its decision and to inform him of the precise reasons for the dismissal. The board refused to do so. The plaintiff then requested a hearing before the board and was informed in writing on May 13, 1969, by Stanley P. Wagner, a representative of the board:

> "* * * Since your request was not made within the required time period, we have no authority to provide you a hearing on your dismissal."

On December 23, 1970, the parties entered into a settlement agreement, the essential terms including the following:

> "In consideration of the promises made in this Agreement, the College and Board hereby withdraw the dismissal for cause proceedings by which Burns' employment was terminated in the spring of 1969, and Burns hereby withdraws his appeals and demands which resulted from that dismissal for cause."

Plaintiff signed the agreement, but as a

basis for this action contends that he did so under the false representation set forth in Recital No. 5 of the agreement:

> "5. By letter dated May 13, 1969, Burns was notified that he had not requested a hearing within ten days after notification of the reasons for his dismissal as required by Board rules."

He thereafter attempted to rescind his signature by returning, uncashed, the $1,800 settlement check that also constituted his salary for the remainder of the 1968-1969 school year.

Approximately one year later, on January 31, 1972, plaintiff again requested in writing the reasons for his dismissal and this request was also refused. He then commenced this action.

Plaintiff contends that this action is governed by the pertinent rule of the Minnesota State College Board, Minn. Reg. SCB 17 (b) (1, 2) (1965). Minn. Reg. SCB 17 (b) (2) provides in part:

> "Dismissal of Non-Tenure Faculty. Until unclassified personnel achieve tenure as hereinafter provided, such personnel shall be deemed to be in a probationary period of employment,

and any annual contract may or may not be renewed as the State College Board may deem fit, provided however such unclassified personnel may be discharged for cause during any contract period upon written notice to such person. If such person requests reasons for dismissal for cause, the State College Board shall give their reason in writing within ten days after receiving such request. Such person, within ten days after receiving such written reason, may make a written request for a hearing before the State College Board, which shall be provided. Termination shall occur at such time as determined by the Board after completion of such hearing if requested. If no hearing has been requested, termination shall occur as provided in the resolution previously adopted. These provisions shall not affect the powers of the State College Board to dismiss under any other provisions provided by law."

After reading the entire record and hearing the oral arguments, this court still does not know why plaintiff was originally discharged. It therefore seems clear that the State College Board did not comply with the above rule, which

required the board, upon request of a discharged nontenure faculty member, to give "reasons for dismissal" in writing. Under reasonable interpretation of that requirement, such reasons should be given in such detail as to leave no doubt in the minds of those concerned of the "cause" for the termination of the annual contract. Failing in this, the board was also derelict in not providing a hearing. The "ten days" limitation memtioned in this rule does not begin to run until such "reasons" are given.

Substantial issues have been recently raised with regard to the employment rights of public employees and of teachers, both tenured and nontenured. Viewing Minn. Reg. SCB 17 (b) (2) with the various principles established in Olson v Regents of University of Minnesota, 301 F. Supp. 1356 (D. Minn. 1969), and Board of Regents v. Roth, 408 U.S. 564, 92 S.Ct. 2701, 33 L. ed. 2d. 548 (1972), we can only conclude that under the standards of those cases due process rights may be violated by failure to provide a hearing upon request.

It should further be noted that Minn. Reg. SCB 17 (b) (2) has now established a complete and thorough procedure to be followed in the dismissal of a nontenured teacher. The complaining party should be fully informed of the available rules of procedure, and if he requests that they be utilized, compliance by the board with those rules is necessary for protection of the dismissed party's rights.

This failure to comply with Minn. Reg. SCB 17 (b) (2) was undoubtedly recognized by the board and provided the basis for its agreeing to the settlement under which the plaintiff was made financially whole, receiving what he would have been paid in salary if the discharge had never occurred.

The main issue, then, for our consideration is whether the settlement agreement entered into by the parties is complete and therefore prevents the application of this State College Board rule.

The lower court found that the settlement made on December 23, 1970, was a mutually executed and binding release and that, thereby, both parties have released any right to claims they may have had arising out of plaintiff's dismissal. We also must conclude that the existence of a valid settlement agreement

between these parties as to these particular rights must control. This court has held in Gronquist v. Olson, 242 Minn. 119, 125, 64 NW. 2d 159, 163:

> "A release has been defined as a relinguishment, concession, or giving up of a right, claim, or privilege, by the person in whom it exists, to the person against whom it might have been enforced. 76 C.J.S., Release, 1. A release may, dependent upon its terms, have the effect of extinguishing a right of action, and if so, it may be pleaded as a defense to any suit on the action."

The facts before us indicate and the agreement specifies that the tendered $1,800 was to satisfy "any and all rights and claims," and the only contingency to be satisfied, before the agreement became binding, was the approval of other public officials. This contingency was met. Consequently, we must find the settlement agreement conclusive evidence that the alleged wrong has been satisfied. We therefore have an obligation to prohibit any further action by plaintiff.

Plaintiff further claims that even though he did execute the agreement, he subsequently became aware of the alleged misrepresentations of defendents. To allow this contention would be to frustrate the very purpose of which these agreements are executed. It appears from plaintiff's deposition of March 23, 1972, that he completely understood both the scope and ramifications of the proposed contract at the time of its execution:

"Q. * * *Were you aware that in this agreement you gave up certain claims, and rights that you might have otherwise had against the State College system? I'm talking about at the time you signed it, now?

"A. Well, I felt at the time that it was bringing it to a conclusion, I hoped it was.

"Q. And you understood, as part of this conclusion, that you were to receive the amount of one thousand eight hundred dollars --

"A. Yes

"Q. --as settlement, and you understood that was a settlement award?

"A. It wasn't what was reasonable, but --

"Q. But you did understand that that was what it was for?

"A. Yes.

Special Assistant Attorney General, appeared in behalf of the defendants in support of the said motion; and Mr. Whitney E. Tarutis, J.D., Attorney at Law, Bemidji, Minnesota, appeared in behalf of the plaintiff in opposition thereto.

And the Court after hearing the arguments of cousel, having reviewed the briefs, and upon all the files, records and proceedings herein, now makes the following:

FINDINGS OF FACT

I

A. That with reference to Count I of the plaintiff's alleged complaint, the plaintiff herein alleges that the defendant Robert D. Decker committed an assault and battery against the plaintiff herein on or about August 1, 1969. That the deposition of plaintiff claims it happened not later than August 16, 1969.

B. That summons and complaint herein were served on Dr. Robert D. Decker on the 23rd day of March, 1972 -- some 31 months after the alleged assault and battery.

C. That Minnesota Statutes provides a statute of limitations for limitation for the commencement of actions for assault and battery (MSA 541.07) to a period of two years. That the cause of action herein under Count I accrued on either August 1 or August 15, 1969, and expired July 31, 1971, or August 14, 1971.

D. That plaintiff's alleged cause of action under Count I has expired and his claim thereunder must be dismissed.

II

A. That with reference to Count II of plaintiff's alleged complaint the plaintiff herein alleges that sometime in March, 1969, and possibly as late as May 13, 1969, Defendant Dr. Robert D. Decker, as an employee of the Defendant Minnesota State College Board, along with others, did slander and libel the plaintiff. The acts, however, as set out in the complaint do not constitute libel or slander.

B. That said alleged complaint was served upon Defendant Minnesota College System on Dr. Mitau, on February 15, 1972, and upon Defendant Dr. Robert D. Decker on March 23, 1972, and on Defendant Robert Dunlap on February 15, 1972 -- some 31 to 35 months after the libel and slander is alleged to have been committed.

C. That Dr. C. Theodore Mitau and Mr. Robert Dunlap are respectively the chancellor and chairman of the Minnesota State College System, and at all times herein were acting in their capacity of their official positions with said College System and as officers of the State of Minnesota . That said State College Board and said State College System are subject to sovereign immunity.

D. That MSA 541.07 provides a statute of limitations for the commencement of actions for libel and slander to a period of two years. That the causes of actions alleged under Count II are barred by said statute as said action was commenced either 31 or 35 months after said causes of action accrued.

E. That Dr. Mitau, a defendant, and Mr. Robert Dunlap, a defendant, were acting in their official capacities in behalf of the State of Minnesota and were at all times hereinmenioned performing their duties in their official capacity and are not subject to tort liability. That said acts were not done either corruptly or maliciously. That the state has not waived its sovereign immunity herein.

III

A. Count III alleges a violation of the plaintiff's civil rights under U.S.C.A.§1983.

Count Iv is founded upon alleged breach of contract.

Count V alleges a claim founded upon a theory of negligence.

That Counts III, IV and V seem to be a reaffirmation of Counts I and II, but upon a different theory, including breach of contract.

B. That all of the allegations in Counts III, Iv and V revolve around the attempted discharge, resignation or removal of the plainttiff from his employment.

C. That previous to December, 1970, there were various claims made by plaintiff against the defendants, and claims by the defendants againts the plaintiff. All of these claims consisted of the performance of the work of the plaintiff in his teaching position with the College System, and particularly at the Bemidji State College. That the disputes were finally settled on December 23, 1970, by a written agreement called "Settlement Agreement", which was executed by the plaintiff subject to approval by the State College Board. That defendants, as representatives of said College Board, did comply with all terms of said agreement, did tender the $1800 as required by said agreement to the plaintiff, and plaintiff did refuse to accept the same.

D. That the action herein is not brought for the purpose of setting aside the settlement agreement on the ground of fraud or duress, but is a claim for damages.

IV

That plaintiff's alleged causes of action have no merit and are barred by statutes and laws of the State of Minnesota.

AND from the foregoing, the Court makes the following:

CONCLUSIONS OF LAW

I

That defendants' motion for summary judgment be and the same is herewith in all things granted, and summary judgment be and the same is herewith ordered entered in favor of the defendants and against the plaintiff herein.

II

That plaintiff's alleged causes of action under Count I and Count II are barred by the statute of limitation (MSA 541.07) as to the same, and defendants are entitled to summary judgment dismissing said counts, and judgment be entered in favor of said defendants and against the plaintiff herein, without costs or disbursements.

III

That there is no genuine issue of law with reference to the plaintiff's complaint.

IV

That plaintiff's alleged causes of action under Counts III, IV and V are without merit and defendants are entitled to judgment against plaintiff dismissing plaintiff's alleged complaint under Counts III, IV and V, without costs and disbursements.

V

That the settlement of December 20, 1970 be and the same is herewith declared to be a full, final release and settlement agreement between the parties thereto and binding upon all the parties thereto.

VI

Let the attached Memorandum be made a part hereof.

LET JUDGMENT BE ENTERED ACCORDINGLY 20 days after the date hereof.

Dated this 1st day of November, 1972.

BY THE COURT:

James F. Murphy
Judge of District Court

MEMORANDUM 1

The Court has reviewed in much detail all of the files and proceedings herein, including the deposition of Dr. Robert B. Burns, taken on March 23, 1972, in the City of Bemidji, Minnesota; and although the pleadings herein are most broad, they tend to narrow down to the main issue which is involved, and that is whether or not the plaintiff has a cause of action against the defendants herein under all of the circumstances alleged in the complaint. In order to properly review the matter in this memo it is going to be necessary to refer to the various counts and the applicable law thereto.

Count I is one which is asserted to assault and battery, which appears to have been committed on or about August 1, 1969.

Count II appears to be one in libel and slander, and the incidents involved therein are alleged to have occurred sometime between October 1, 1968, and June 11, 1969. The Court does not see how it is possible to extend any incident after June 11, 1969.

MSA 541.07 provides as follows: "Except where the uniform commercial Code otherwise, the following actions shall be commenced within two years:

MEMORANDUM p.1-2

(1) For libel, slander, assault, battery * * *" etc. Here the alleged assault and battery occurred on August 1, 1969, and the cause of the action arose on that date. The two years expired on July 31, 1971, and the action herein was not commenced until February 15, 1972, some 6½ months after the cause of action accrued. Therefore, the complaint with references to Count I and II must be dismissed and plaintiff does not have a cause of action thereunder.

With reference to Count III, which involves a claim for violation under civil rights, Count IV, which involves a claim under breach of contract, and Count V, which involves a claim under a negligence theory, the Court finds that the mutually executed release of December 23, 1970, is a binding release and, therefore, releases the parties from any claims against the other with reference to civil rights, contract or negligence.

In Gronkist vs. Olson, 242 Minn 119, 65 NW2d 159, the Court said, (p.125):

> "A release has been defined as a relinquishment, concession, or giving up of a right, claim or privilege, by the person in whom it exists, to the person against whom it might have been enforced."

MEMORANDUM p.2

"76 C.J.S. Release 1. A release may, dependent upon its terms, have the effect of extinguishing a right of action, and if so, it may be pleaded as a defense to any suit on the action."

The release herein is clear, concise, and is a mutual release. The plaintiff herein released the defendants and the college board from making any further claims, or request for further compensation or employment from the college. It further provides for the payment of $1800.00 to fully satisfy <u>any and all claims</u> that he may have arising out of his employment. In addition to the $1800.00, the college agreed to minimize his leaving the college by not releasing to the news media the actual facts relative to his resignation or discharge by a statement that his employment was terminated by mutual agreement.

Here the contract of settlement is of such a nature that the law deems it conclusive evidence that the alleged injured party plaintiff herein has by said agreement been fully satisfied for the alleged wrong, and, therefore, the Court has the duty to bar any other action against the alleged wrongdoer.

MEMORANDUM p. 2-3

The Minnesota courts have adopted the restatement of contracts Par. 417. See Rogalla vs. Rubbelke, 261 Minn 381, 112 NW2d 581, which provides generally as follows: "The following rules are applicable to a contract to accept in the future: (a) stated performance in satisfaction of an existing contratual duty, or a duty to make compensation; (b) If such contract is performed, the previously existing duty is discharged." The comment by the reporter states, "The rules governing the validity and effect of accord and satisfaction are applicable as well where the pre-existing duty arises from tort as where it is based on contract.

It is needless for the Court to further explain the rule. It has long been the policy of the courts to recognize and favor settlement made openly and without fraud or duress. It is the opinion of this Court that the settlement agreement entered into between the parties hereto under date of December 23, 1970, took into consideration of plaintiff's claims as alleged in his complaint, or otherwise, and likewise took into consideration all of defendants' claims, counterclaims, and causes of action, and that both parties by said agreement contemplated thereby

a full and complete settlement of all causes of actions and claims that the parties had against each other, whether founded upon tort or contract, and did by the execution thereof constitute a settlement which is binding upon the parties.

It appears to the Court that all plaintiff is seeking is some sort of a statement from the College Board of the basis for his discharge. This was entirely annihilated by the settlement agreement, which actually at plaintiff's request requires the Board not to disclose its reasons for his release from his duties and provided for a mutual agreement on his withdrawal from employment with the college.

Plaintiff seems to contend in his argument and brief that rules and regulations of the College Board were not complied with in that he was advised that he had no right to a hearing, when in fact the rules and regulations of the College Board provided for such a hearing. However, the settlement agreement contemplated a difference of opinion between the Board and the plaintiff with reference to this matter and therefore, was part of the settlement agreement.

MEMORANDUM p. 3-4

It seems to the Court under the pleadings, depositions and files herein, where there has been no fraud or bad faith on the part of the parties, that if the Court would allow the settlement agreement to be reopened and set aside by the whim of either party it would create uncertainty, chaos and confusion as to the effect of settlement in future cases. This would be an injustice to parties, litigants and others who might be similarly involved in the future and who depend on the reliability of such settlements.

The Court herein has not construed the Federal Civil Rights Act, 42 U.S.C.A.§ 1983, because the Court's ruling on the release eliminates any need for such a ruling.

We are not here dealing with uneducated, ignorant persons. The plaintiff is well educated, and has B.S., M.A. and PhD degrees. He is most fluent in the use of the English language, and he certainly could not have misunderstood or misconstrued the obvious intent and consequences of the settlement agreement of December 23, 1970. The settlement was partially made to save the plaintiff from embarrassment and humiliation, which he now appears to be willing to face.

MEMORANDUM p.4

Nothing herein shall, of course, prevent the plaintiff from cashing the $1800.00 voucher previously presented to him, and which shall be re-tendered should there be no appeal from this order.

The Court wishes to refer briefly in this Memorandum to part of the deposition of the plaintiff taken on March 23, 1972. (Page 92 - referring to settlement agreement:)

"Q. * * *Were you aware that in this agreement you gave up certain claims, and rights that you might have otherwise had against the State College System? I'm talking about at the time you signed it, now?

"A. Well, I felt at the time that it was bringing it to a conclusion, I hoped it was.

"Q. And you understood, as part of this conclusion, that you were to receive the amount of one thousand eight hundred dollars --

"A. Yes

"Q. - - as settlement, and you understood that was a settlement award?

"A. It wasn't what was reasonable, but -

"Q. But, you did understand that that was what it was for?

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"A. Yes

"Q. Did you receive a check from the State of Minnesota in that amount, at some time subsequent to this agreement?

"A. Yes, I did."

Such testimony by plaintiff definitely perfects a settlement agreement and particularly at a time when plaintiff was represented by capable and reliable attorney, Mr. Lee Frankman.

Although the Court has rendered it's decision in this matter, relying upon the settlement agreement of December 23, 1970, nevertheless, the Court does wish to state that it believes that so far as the Civil rights action under Count III and the negligence action under Count V are concerned,that the defendants are immune from liability. Throughout the entire proceedings involved in the complaint the defendant individuals, Dr. G. Theodore Mitau, Chancellor, and Mr. Robert Dunlap, Chairman, were acting as officers of the College Board, and in so doing they were performing their duties under the laws of the State of Minnesota, and as such an officer charged in the performance of certain duties they are not personally liable for errors of judgment or for acts done within the scope of their authority, unless it appears that the particular acts

complained of were not only unnecessary but were done corruptly or maliciously. (See Johnson vs. Callisto, 287 Minn. 61, 176 NW2d 754).
The theory of plaintiff's complaint, although it has used the word "malicious," certainly does not indicate, nor does the review of the deposition indicate, that there were any acts that were done maliciously or corruptively and, therefore, the individual defendants are not liable when acting within the scope of their authority.

Throughout the argument at the time of the motion, and from reading the deposition, it is clear to the Court that the only redress that really the plaintiff is seeking is to have a hearing before some college board to give him the reasons why he was discharged or why he was forced to resign. If this be true certainly the settlement agreement of December 23, 1970, is a binding contract on both parties, which in effect prevents the State College Board and Bemidji State College and its officers and employees from in any way disclosing why the plaintiff left his employment with Bemidji State College, and provides:

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"That the only public statement that he will make concerning his situation to the nes media or other public officials regarding this settlement is:

My employment at Bemidji State College was terminated by mutual agreement between the College and myself. We have reached an agreeable settlement of any differences that may have existed, and I wish the College well."

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That in addition thereto the plaintiff agreed to withdraw any and all requests for a hearing or further compensation from the College Board.

J. F. M.

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT

Dr.Robert B. Burns,
Plaintiff,
vs.
Dr.Robert D. Decker; Minnesota State College Board,Robert Dunlap, Chairman; Minnesota State College System, Dr. G.Theodore Mitau, Chancellor,
Defendants,

O R D E R

The above-entitled matter came on to be heard before the undersigned, one of the judges of the above-named District Court, in the Court House in the City of Bemidji, County of Beltrami, Stste of Minnesota, on the 22nd day of November, 1972, at 1:00 o'clock p.m., on a motion made in behalf of the plaintiff for an order of the Court amending the Findings of Fact, Conclusions of Law and Order for Summary Judgment entered herein under date of November 1, 1972, pursuant to Rules of Civil Procedure 52.02 and 59.03. Mr. Whiteny E. Tarutis, J.D., Attorney at Law, Bemidji, Minnesota, appeared in

behalf of the plaintiff in support of said motion; and Mr. Phillip D. Nelson, special counsel to the Attorney General in behalf of Warren Spannus, Attorney General, Curtis Forslund, Solicitor General, and Theodore May, Special Assistant Attorney General, appeared in behalf of the defendants in opposition thereto.

And the Court being fully advised in the premises,

IT IS ORDERED that said motion be and the same is herewith in all things denied.

LET JUDGMENT BE ENTERED FORTHWITH as ordered by the Court under date of November 1, 1972.

Dated this 27th day of November, 1972. File No. 23281

BY THE COURT:

James F. Murphy
Judge of District Court

MEMORANDUM 1

The Court sees nothing new in the motion which was not before the Court in the motion for summary judgment. Plaintiff's counsel argues that he could not commence an action for the purpose of setting aside the alleged settlement agreement because he does not regard it as a settlement agreement. In this the Court cannot agree with plaintiff's counsel.

All of the matters presented to the Court on this motion were before the Court on the original motion, and the Court having decided in favor of summary judgment in behalf of the defendant is not now inclined to change its decision.

Plaintiff's counsel likewise argues that there is more to this case than whether or not the plaintiff is entitled to a hearing before the Minnesota State College Board. In reference to this matter I call attention of plaintiff's counsel to a letter and statement of the plaintiff himself under date of November 22, 1972, which was filed with this Court, and which reads as follows:

> "The plaintiff, Robert B. Burns, believes that the court proceedings can be simplified to one basic issue-

APPENDIX D
MEMORANDUM p.1

the question of whether or not the plaintiff is entitled to a hearing before the Minnesota State College Board."

This reference was made by the Court itself in the original order herein, and it is still the Court's opinion that based upon all the facts presented to the Court, and the deposition of the plaintiff himself, that a legal and binding settlement agreement existed which prevented the College Board from granting him a hearing.

J.F.M.

STATE OF MINNESOTA IN DISTRICT COURT
COUNTY OF BELTRAMI NINTH JUDICIAL DISTRICT

Dr. Robert B. Burns,
Plaintiff,
vs.
Dr. Robert D. Decker; Minnesota State College Board, Robert Dunlap, Chairman; Minnesota State College System, Dr. G. Theodore Mitau, Chancellor,
Defendants,

J U D G M E N T

The above entitled matter came on to be heard before one of the Judges of the above named District Court, upon a motion made in behalf of the defendants for an order of the court granting a summary judgment in behalf of said defendants and against the plaintiff herein, on October 3, 1972, in the Courthouse in the City of Bemidji, County of Beltrami, State of Minnesota. Mr. Phillip D. Nelson, special counsel to the Attorney General in behalf of Warren Spannaus, Attorney General, Curtis Forslund; Solicitor General, and Theodore H. May, Special Assistant Attorney General, appeared in behalf of the defendants in support of said motion; and Mr. Whitney E. Tarutis, J.D., Attorney at

Law, Bemidji Minnesota, appeared in behalf of the plaintiff in opposition thereto.

NOW, THEREFORE, pursuant to said Findings of Fact, Conclusions of Law, and Order for Judgment, and upon motion of Phillip D. Nelson, one of the attorneys for the above named defendants,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That summary judgment be and the same is herewith entered in favor of the defendants and against the plaintiff herein.

2. That as to plaintiff's alleged causes of action under Count I and Count II, summary judgment dismissing said Counts is hereby entered in favor of said defendants and against the plaintiff herein, without costs or disbursements.

3. That there is no genuine issue of law with reference to the plaintiff's complaint.

4. That as to plaintiff's alleged causes of action under Counts III, IV and V, summary judgment dismissing said Counts is hereby entered in favor of said defendants and against the plaintiff herein, without costs or disbursements.

5. That the settlement of December 20, 1970 be and the same is herewith declared to be a full, final release and settlement agreement between the parties thereto and binding upon all the parties thereto.

6. That the Memorandum attached to the Findings of Facts and Conclusions of Law be made a part thereof.

Dated at Bemidji, Minnesota, this 30th day of November, 1972.

No. 23281

BY THE COURT:

CLERK OF DISTRICT COURT

SETTLEMENT AGREEMENT

THIS AGREEMENT is made on this 23rd day of December, 1970, between ROBERT B. BURNS (referred to herein as Burns) and STATE COLLEGE BOARD, (referred to herein as BOARD), acting for and on behalf of BEMIDJI STATE COLLEGE (referred to herein as College).

RECITALS

1. Burns was employed by the College during the school year of 1968-69.
2. Burns was notified prior to December 15, 1969, that he would not be reOhired for the 1969-70 school years.
3. Due to disagreement between the College and Burns, Burns was notified by a letter dated March 21, 1969, signed by President R. O. Decker, that he was being dismissed for cause effective March 24, 1969.
4. By letter received at the State College Board Office on May 8, 1969, Burns requested a hearing before the Board.
5. By letter dated May 13, 1969, Burns was notified that he had not requested a hearing within ten days after notification of the reasons for his dismissal as required by the Board rules.
6. At various times since then Burns has repeated his request for a hearing and/or for payment under his contract from the time of his dismissal to the end of the school year.

7. The parties wish to resolve their differences amicably without further resort to hearings or other further resort to hearings or other forms of litigation.

TERMS

I

In consideration of the promises made in this agreement, the College and Board hereby withdraw the dismissal for cause proceedingsby which Burns' employment was terminated in the spring of 1969, and Burns hereby withdraws his appeals and demands which resulted from that dismissal for cause.

II

The College and the Board agree:

A. To withdraw the dismissal for cause proceedings by which Burns' employment was terminated in the spring of 1969, and to indicate in a letter that any termination prior to the end of the contract period for which Burns had been employed (school year 1968--69) was by mutual agreement. A copy of that letter is attached to, and hereby incorpated into this Agreement. Burns may use

that letter to explain the basis upon which he left Bemidji State College to any and all future potential employers.

B. To pay Burns the amount of $1800 as full payment for any and all claim Burns may have resulting from his employment at Bemidji State College.

III

Burns agrees:

A. That he hereby withdraws any and all requests for hearings and/or compensation from the College and the Board, and agrees that the payment being tendered to him and other consideration herein fully satisfies any and all claims that he may have arising from his employment at the college. He further agrees that he will no longer make any claims or requests for further compensation or employment at the College, or within the Minnesota State College System.

B. That the only public statement that he will make concerning his situation to the news media or other public officials regarding this settlement is:

> My employment at Bemidji State College was terminated by mutual agreement between the College and myself. We have reached an agreeable settlement of any differences that may have existed, and I wish the College well.

C. That by entering into this Agreement, neither the college nor the Board are in any way conceding that there were not adequate grounds for the dismissal for cause; also neither the College nor the Board are in any way conceding that Burns did not receive full and adequate notice and by his own delay waive any right to a possible hearing before the board and additional compensation pursuant to his contract.

IV

This Agreement and the payment contemplated herein are subject to the approval of other public officials. If this Agreement and the payment contemplated herein cannot be made it is mutually agreed that neither this Agreement nor any of the terms contained herein will be made known to anyone or used for any purpose whatsoever by either party. If the Agreement and the payment contemplated herein can not be made, the dismissal proceedings previously undertaken shall remain in full force and effect, and each party shall retain any and all rights and claims in existence prior to entering into this Agreement.

IN PRESENCE OF: /s/ Robert B. Burns
/s/ Sharon Schuster STATE COLLEGE BOARD
/s/ Randal C. Berkland By: /s/Norman Dybdahl

BEMIDJI STATE COLLEGE

BEMIDJI, MINNESOTA 56601

PRESIDENT'S OFFICE December 17, 1970

218-755-2011

Dr. Robert B. Burns

1505 B Monument Avenue

Port Saint Joe, Florida 32456

Dear Dr. Burns:

This letter is to confirm our previous conversation regarding your employment at Bemidji State College. It began during the summer of 1967. I recognize that one of the problems that you worked on while at Bemdiji State College was bridging the gap between scientists and educators. During your employment here at Bemidji State College, you devoted a great deal of time and effort toward this goal. You were partially successful in bridging this gap and did make people aware of the problem.

It was by mutual agreement that your relations with Bemidji State College were terminated during the spring quarter 1969.

/s/ By R. D. DECKER
President

RDD:mk

RESPONDENTS ARGUMENT FIRST PETITION

ARGUMENT[72]

"While petitioner in his petition and brief alleges numerous errors on the Minnesota Supreme Court relating to federal questions, it is obvious upon cursory reading of the decision that the Court held Burns settled his case, settlement of claims is desirable, and the settlement was not fraudulent, all consistent with long standing Minnesota law. Respondents assert that these decisions by the Minnesota Supreme Court on its local law and the facts upon which the Court founded its' Judgment are controlling. Scripto v. Carson, 362 US 207 (1960).

[72] The above quoted argument was prepared by the defendants' counsel for the Respondents' Brief in Opposition to Petition for Writ of Certiorari, page 3, in Burns v. Decker, 416 US 991, cert. denied (1974). The defendants' counsel was incorrect in that the issue concerning plaintiff's restrictions on future employment was brought up early in the proceedings at the trail court level. The defendants' counsel is incorrect concerning the justice who inquired for this justice vigorously asked the defendants' counsel not the plaintiff's counsel if such restrictions might be "a little over-reaching."

The only possible issue of any substantive merit asserted in all of petitioner's material is his claim that part of the settlement agreement precluding him from further employment in the State College System is unconstitutional. this issue was not raised at the trail court level, was not raised on appeal or brief to the Minnesota Supreme Court, and has never before been asserted by petitioner. The issue first arose upon oral argument of this case in the Minnesota Supreme Court when one of the justices asked counsel for petitioner whether this clause might not be a little over-reaching. Inany case, it was not considered by the Minnesota Supreme Court in reaching its decision. An issue raised for the first time on petition for certiorari and not considered by the trial court or the Minnesota Supreme Court is not reviewable. Helvering v. Minnesota Tea Co., 296 US 378 (1935).

There appeard to be no 'special and important reasons' for granting this request for writ of certiorari. U.S. Supreme Court Rule 19; Rice v. Sioux City Cemetery. 349 US 70 (1955)."

PROFESSIONAL BACKGROUND

Introduction- To direct that steady effort to that important business of living and working in a community, that was the kind of settlement Professor Robert B. Burns had in mind when he and his family moved to Bemidji in 1967. The following background information is for the purpose of showing the investment new faculty bring in the way of credentials and experience to a community such as Bemidji.

Resume' of Experience-

Burns had taught school in Peoria, Illinois, achieving tenure status, from 1956-60. At the University of Florida he assisted several professors in teaching science methods and in work supervising prospective teachers in science at both the elementary and secondary levels. He also assisted the Executive Secretary of the Florida Foundation of Future Scientists. In 1962 Burns successfully completed the qualifying examinations for the doctor's degree. During 1962-63 he taught classes in physical science at New York University College in Buffalo, New York. In 1963-64 he served as visiting lecturer in science education at Central Washington State College. Here he filled the shoes of a skilled science educator who was taking the place of another science educator who was going to work in India. (It was just by coincidence that the professor going to

India was chairman of Burns' doctoral committee).

The next year Burns worked at the Women's College in Milledgeville, Georgia. It was here that he conducted the pilot study for the research he had in mind in science education. Many pupils in the Peabody Laboratory School, college students and faculty helped him learn some of the fundamentals in complex research procedures. The following year he conducted the major research project at the P.K. Yonge Lab School in Gainesville, Florida. It was fortunate that he had learned from the preceding year how to keep track of data in a systematic and orderly manner.

After the basic data was collected Burns was then invited to the University of Illinois on a research fellowship. At the University of Illinois the research data on children's uses of scientific ideas was processed by the most recent technological devices. One was an optical scanning system known as the "Digiteck" process which takes the raw data and transfers it to computer cards and with this the IBM 7094 computer multiplied the original data into secondary and tertiary levels waist high practically. Now the problem was to discover the most meaningful information from this hugh amount of information.

In the autumn of 1966 Burns served as a consultant in science education at Northern Illinois State University. Here he discovered that "doctors" were not so enthusiastic on his "consultantship." For that matter Burns wasn't either being thoroughly concerned lest an important research project were to utterly disentegrate, corroding with the passage of time. So early in 1967 Burns returned to the University of Florida to complete the research project. By this time the investment in the research project amounted to many thousands of dollars but more importantly many persons had invested their precious time, earnest efforts and resource skills making it possible for a complicated research project to be completed.

With regard to the financial aspects it should be stated that the Natioal Science Foundation had originally invested in Burns' advanced studies awarding him three summer fellowship, 1957-60 and so therefore the federal government had invested considerably in Burns' professional development as well. With respect to Bemidji it was important that he have reasonable opportunity to be successful in teaching considering the total investment involved. To be a decent teacher a person must remain in a location for a reasonable length of time.

Observation-

In looking back over the years of experience I can say that probably my most successful years of teaching were in Peoria, Illinois. At that time, while I was not well versed in complicated research, the elementary kids and I spent many enjoyable hours learning things about science. Even though I agree with Robert Maynard Hutchens concerning the "university" - he said "A university can be a university without any 'teaching' but it cannot be one without any 'research'!"[73] I am aware as well that graduates from schools of higher learning may be over enthused with the almost magical connotations of research and may fail to hear the sounds of little children, even undergraduates, who are getting interested in some of their own ideas concerning "inquiry." Another observation that goes without saying regardless of the degrees and credits achieved each of us can profit by returning to school as a "student" in marked contrast to that of being a "teacher."

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[73] Robert Maynard Hutchens was a former chancellor of the University of Chicago. He has been the champion and exponent of the classical point-of-view on what the school should be. Refer also Philosophy of William James - "Pragmatism" - in A Short History of the United States by Nevins and Commager, ibid p. 426-427 as well as John Dewey's Philosophy of Education generally known as Progressive Education. See footnotes number 65 and 66 in Argument "Justice and Common Sense," herein.

APPENDIX H
POLITICS IN COLLEGES AND UNIVERSITIES

Introduction-

The dispute which developed in 1967-68 at Bemidji State College was more than a dispute over whether or not a job existed for there were other important matters relating to the development and organization of science education as a field of endeavor.

Science Education and Politics-

Teachers in science education, whether operating in Science or Professional Education are generally aware of the important competition that typically exists at a college, such as Bemidji, developing away from strictly a normal-teacher's college toward that kind of school having greater diversity in its total educational program. And more generally at a "university" there exists two important political camps in higher education that of the professional schools on the one hand and that of the more classically and basically oriented referred to as the arts and sciences on the other.

The arts and sciences provide the basic disciplines upon which the professional schools so greatly depend. The professional schools produce the person skilled in making the applications of the arts and sciences in society. Each has its own important research function in the on-going developments in higher education.

APPENDIX H
POLITICS IN
COLLEGES AND UNIVERSITIES

Case and Controversy-

The controversy that developed at Bemidji State College during Burns' second year, 1968-69, became more than a dispute over academics or Burns' job status for Burns had become involved in providing the College with constructive initiatives leading to the formation of a special-liason committee in science education. (Presumably it was not a committee to help Burns be a better teacher, although this might very well be a suitable question for a Board of Higher Education to consider). But the Committee was created out of the initiatives of Burns'colleagues, by them, and for the College. It was formed to serve in providing good communication and to be helpful in the development of new science education programs. It was considered to be much in line with the previous efforts at the College to form a Science Education Department. While the Committee was not deemed to be a declaration of independence form administrative controls it was never-the-less potentially valuable and no one knew at that time whether or not this Committee would actually become useful. Its future was unknown

As a consequence of the Burns' initiative, not to mention the much more important initiatives of his colleagues in science education and genuine doubts by the administration concerning Burns' teaching capabilities, there was considerable confusion on just what the controversy was all about. But the controversy reached major proportions when Burns was fired outright from whatever teaching position he thought he might have had by the new-college president. It was undoubtedly embarrassing to Burns' colleagues who were showing earnest efforts in science education.

The fight was just getting off to a good start, however, for what was to develop later would become not simply a classic-college quarrel but a conflagration involving the Central Administration of the Minnesota State College System and the State College Board as well. Here the controversy would involve whether or not to breach board rules, what importance research is as a requisite to producing doctors, and the significances of earned degrees from established and recognized schools in higher education. (There was undoubtedly the question in the Chancellor's mind concerning whether or not to breach the rules in the best interests of a College). (Just why it was an important

decision is the subject of a hearing before the Board concerning not only Burns' status but the importance of a Committee which was just getting started when Burns was fired).

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Politics and Competition-

In Case and Controversy there is illustrated to some degree the initiative of faculty thru small ventures in the formation and development of a committee in science education. The science education committee initiative represented the kind of cooperative action the Chancellor was speaking of during the autumn of 1968 at the time the committee was being formed. The Chancellor presented to the faculty of Bemidji his views concerning the Common Market idea for the College System.

Now the Common Market Program was initially described as a way of combining the total educational resources of higher education commensurate to that of a university. To achieve good working relationships among the seperate colleges, divisions,departments would require cooperative ventures. this meant that competition must be the kind of constructive effort that will lead to serviceable resource benefits. Even though geographically dispersed, the

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POLITICS IN
COLLEGES AND UNIVERSITIES h5

State Colleges would become a university system -- the Common Market idea meant that each of the separate colleges would develop along their own unique educational lines as was relevant to the important needs and resources of the respective communities. The Common Market as a Program, if it was to work dependended upon the combined cooperative efforts of the colleges in the Minnesota State College System.

APPENDIX I
A JUDICIAL APPLICATION IN EXTERNAL GOVERNANCE PROCEDURES
*AN ILLUSTRATION

ii

Of interest to the Case as herein presented was the independant action which took place concerning another professor's dismissal. This time it was concerning the dismissal of a tenured professor in political science due to declining enrollments in that field. The attorney representing the tenured professor stated that the college officials have "an obligation to fully comply with the State College Board Rules" concerning the termination of a tenured faculty member. The necessary compliance with the rules was established by the Burns decision, it was argued, and it must be closely construed in the Board's considering his client's employment status.[74]

The attorney stated further that "the tenor of the Burns decision indicates that the college has improperly deprived" his client of his rights afforded him under the Board rules, and he said that "at a bare minimum" the rules must be construed as being implemented through meaningful mutual cooperation. (The

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[74]Burns v Decker, 212 N.W. 2d 886 (1973), refer also Appendix C. herein.

implication was that ordinarily the rules for tenured professors are closely linked to those important interests of the College regarding the educational programs in this instance it was in the field of political science).[75]

Unfortunately the Board took no account of recent events in the United States which may have caused only temporary declines in political science, nor were they influenced by the Burns decision feeling compelled under pressures from the State Legislature to cut costs.[76]

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[75]Reference is made to Attorney Eric R. Miller's letter, May 15, 1975 of the Law Firm of Oppenheimer, Wolff, Foster, Shepard and Donnelly, to the Minnesota State University Board's hearing officer, not on file, herein.

[76]Reference is made to the August 19, 1975 Board Minutes.